No. 14560

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a Corporation, Appellant, vs. AUDRA H. PALMER, Appellee.	Appeal from the United States District Court for the District of Arizona

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BRIEF OF APPELLANT

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BRIEF OF APPELLANT

Jurisdiction

The above-entitled proceeding arose upon an appeal from a judgment entered in an action by Audra H. Palmer, hereafter called Palmer, against State Farm Mutual Automobile Insurance Company, a corporation, hereafter called Company. The complaint is on an automobile liability insurance policy issued by Company to one Ralph E. Nollner, hereafter called Nollner. The complaint seeks judgment for $10,000, together with costs and interest at the rate of 6% per annum from January 18, 1951 by Palmer against Company as a result of Palmer's judgment obtained in the Superior Court of Maricopa County against Nollner, who was an insured of Company at the time

an accident occurred in which Palmer, as a guest passenger of Nollner, received certain injuries.

The action is one between citizens of different states and the amount of the controversy exceeds $3,000, exclusive of interest and costs. The jurisdiction of the District Court rested upon diversity of citizenship. *28 U.S.C.A. Sec. 1332*

The action was tried by the District Court sitting without a jury upon the complaint of plaintiff. (R. 3) The District Court by minute order found the issues made by the complaint and the answer of Company in favor of the Plaintiff Palmer. Findings of Fact and Conclusions of Law were submitted by Plaintiff Palmer and over objection of the Defendant Company were approved and settled by the Court and judgment entered finally in the amount of $10,000, together with interest thereon at the rate of 6% per annum from January 18, 1951 until paid, together with her costs therein incurred. The said judgment having become final, the present appeal is predicated upon *28 U.S.C.A. Sec. 1291*

Statement of the Case

On March 16, 1946, Company issued and delivered to Nollner its automobile liability Policy No. 33000-FS-03 which was in full force and effect for a period expiring on March 16, 1948. On January 17, 1948, Nollner was driving his 1946 Studebaker Sedan which was covered under the policy aforesaid and at said time Nollner's wife was riding with him in the front seat of the car and the Plaintiff-Appellee, Audra H. Palmer, was riding in the rear seat of the automobile which was also occupied by a Mrs. Hillyer, daughter of Nollner. An accident occurred wherein Mrs. Nollner was killed and Mrs. Palmer and Mrs. Hillyer were seriously injured.

The Policy (Defendant's Exhibit 30-R.292) provided, among other things, as follows:

"3. INSURED'S DUTIES IN CASE OF LOSS. As a condition precedent to the enforcement of any right under the policy, the insured shall * * *

"(c) ASSIST AND CO-OPERATE with the Company in investigating, securing and giving evidence, and in the conduct of suits and by attending hearings and trials as well as in obtaining reasonable repairs for the damage done to the described automobile.

* * *

"5. ACTION AGAINST COMPANY.

"(a) With respect to all coverages no action shall lie against the Company unless, as a condition precedent thereto the insured shall have fully complied with all the terms of this policy nor until thirty days after proof of loss is filed."

After the accident, Nollner gave Company due notice of the accident.

The Appellee, Palmer, commenced an action in the Superior Court of Maricopa County, Arizona, hereinafter referred to as Superior Court action, being Cause No. 65336, for bodily injuries she received in the accident aforesaid.

On January 11, 1951 after counsel for Nollner had withdrawn from the cause, a trial was held in the nature of a default action, and there was rendered on January 18, 1951 a judgment in the sum of $27,500 in favor of Audra H. Palmer and against Ralph E. Nollner. On April 10, 1951, the Sheriff of Maricopa County, Arizona returned to the Superior Court, wholly unsatisfied, the execution issued on the judgment. Appellee-plaintiff thereafter made demand upon Company for payment of the policy limits of $10,000 for injuries to one person which demand was refused.

Thereafter, on May 15, 1951, suit was commenced in the Federal District Court of Arizona by Audra H. Palmer against Company.

The record shows that the Superior Court action was set for trial on 5 different occasions. It further shows that the Superior Court action was continued three times as a result of motion for continuance filed by Nollner's attorney, one time by motion of the court, and on the fifth setting the motion for continuance was denied and counsel for Nollner, who had been employed by Company to represent Nollner in accordance with the terms of the policy, withdrew.

For convenience of the Court, we believe it advisable to set forth separately the acts occurring prior to four of the trial settings.

A. FACTS PRIOR TO FIRST TRIAL DATE—JUNE 6, 1950

On May 10, 1950, a letter was written by Company's Superintendent in Berkeley, California, to Denver Claims Office, advising the Denver Claims Office to be alerted for a request from Phoenix counsel to Nollner for Nollner to proceed to Phoenix. (Plaintiff's Exhibit A - R. 139). Thereafter, Nollner's attorney wrote to Nollner in Denver, requesting his appearance in time for the depositions and attendance at two trials (Defendant's Exhibit 2 - R. 64-65). Although not material to this appeal, it is important to point out that there was a suit filed by Mrs. Hillyer which was set for trial on June 1, 1950 and the suit of Palmer was set for trial on June 6, 1950.

Thereafter, Company's attorney in Denver advised the Phoenix attorney that Nollner refused to come to Phoenix for the trial during June but could come any time after July 1. (Defendant's Exhibit 3 - R. 67). At the same time Company's attorneys in Denver questioned Nollner and among other

things set forth his duties and obligations under the policy and requested the attendance of Nollner at the trial. (Defendant's Exhibit 4 - R. 68-80). Nollner at that time requested the trial setting be continued until after July 1. Thereupon Phoenix counsel for Nollner filed a motion for continuance which was argued on May 27, 1950 and the case was reset for July 13, 1950. (R. 80-81).

B. FACTS PRIOR TO SECOND TRIAL—JULY 13, 1950

Defendant's counsel after the resetting of the case advised Nollner of the trial date of July 13 and requested that he be in Phoenix on July 10 so that his deposition could be taken by Palmer's attorneys and advised that arrangements would be made to tender travel expense to Nollner prior to his trip to Phoenix. (Defendant's Exhibit 6 - R. 85). On the same date a letter was written by Nollner's Arizona attorneys to Company's adjuster in Denver, making a like request upon the adjuster. (Defendant's Exhibit 7 - R. 86-87). On July 8, 1950, Nollner wired the Phoenix attorney that it was inadvisable for him to leave Denver for the Palmer trial and expressed hope that trial could be postponed. (Defendant's Exhibit 8 - R. 89).

Thereafter a motion for continuance was filed by Nollner's Phoenix attorney, requesting the continuance. Such a motion was heard by the Superior Court on July 12, 1950, and the Superior Court granted the continuance and reset the case to September 25, 1950. (Defendant's Exhibit 10 - R. 91-96).

On July 13, Nollner's Phoenix attorneys wired Nollner that the case had been continued to September 25, 1950 (Defendant's Exhibit 12 - R. 99).

C. FACTS PRIOR TO THIRD TRIAL DATE—DECEMBER 19, 1950

Above you will note that the case was continued to September 25, 1950; however, the Court's calendar required the Judge to reset the case for December 19, 1950. (R. 100) Thereafter, Nollner's Phoenix attorney advised him of the December 19, 1950 trial setting. (Defendant's Exhibit 13 - R. 101).

Again, on December 2, 1950, Nollner's Phoenix attorney advised him that the December 19 trial date would probably not be reached and that it would be heard perhaps a week later. (Defendant's Exhibit 14 - R. 103). Thereafter under date of December 17, 1950, Nollner wired his Phoenix attorneys that it was impossible to be in Phoenix for the trial on the 19th of December. (Defendant's Exhibit 16 - R. 106). Such wire was confirmed by letter of the same date. (Defendant's Exhibit 17 - R. 107).

On December 15 a wire had previously been received from Company's Denver representative that Nollner would not attend the December 19 trial. (Defendant's Exhibit 15 - R. 108).

A third motion for continuance was filed on December 17, 1950, and the case was reset for January 11, 1951. (R. 109).

Nollner was advised of the January 11 trial setting by telegram of December 19, 1950 from Nollner's Phoenix attorneys (Defendant's Exhibit 18 - R. 110). Thereafter letter was written by Nollner's Phoenix attorney on December 22, requesting Nollner be in Phoenix on January 10, 1951. (Defendant's Exhibit 19 - R. 111-112)

D. FACTS PRIOR TO JANUARY 11, 1951, TRIAL DATE

On January 9, Nollner's Phoenix attorney was advised by Company's Denver office that Nollner would be in Phoenix at 8:00 p.m. on January 10. (Defendant's Exhibit 20-R. 114). However, a wire was received by Nollner's Phoenix attorney on January 10,

advising that Nollner would not attend the trial (Defendant's Exhibit 21 - R. 116). Thereupon a motion for continuance was again filed by Nollner's Phoenix attorney (R. 114-115). A complete transcript of the proceedings on the argument for motion for continuance is set forth in Defendant's Exhibit 22, R. 117. The hearing on the motion for continuance was had on January 10, 1951 late in the afternoon and continuance was denied at that time. (Defendant's Exhibit 22 - R. 118). On January 11, 1951, Nollner's Phoenix counsel filed a motion for leave to withdraw from the case which motion for leave to withdraw was argued and finally granted by the Court. (Defendant's Exhibit 22 - R. 129).

On January 10, 1951, Company's Denver attorneys met with Nollner and discussed his appearance at the trial in Phoenix and questioned Nollner concerning his failure to attend, demanded Nollner's attendance and offered expense money for the trip. (Defendant's Exhibit 25 - R. 241). At that time Nollner's answers indicated that he would determine whether or not he would come to Phoenix at a future time if a continuance was granted and that he had permission from his employer to leave Denver for the trial of January 11, 1951, and that his employer had left the matter up to Nollner. (Defendant's Exhibit 25 - R. 248, 251). In other words, Nollner gave no assurance to Company's Denver attorney that he would ever come to a trial at a later date.

Thereafter, on January 11, Company's Denver attorneys wrote a letter to Nollner, setting forth what had happened in Phoenix regarding the motion for continuance and that Nollner's Phoenix attorney would withdraw from the trial. (Defendants Exhibit 27 - R. 254-256.)

Prior to the trial of the Superior Court action, Plaintiff's attorney had advised Nollner's Phoenix attorney that he was going to have present at the trial a Mr. Height who was the driver of the adverse car involved in the accident

and who had not been located by Company's attorneys or adjusters. (R. 180-181). There were other witnesses whose testimony might have disputed that of Nollner's (R. 162-163) and at the actual trial of the cause a Mr. Harmonson, brother of Apellee-plaintiff, testified to an alleged admission made by Nollner (R. 183-184). It was the opinion of Nollner's Phoenix attorney that there would have been an excellent chance for a verdict for the Defendant Nollner if he had been personally present at the trial and the attorney did not feel he could win the case if it had proceeded to trial with Nollner absent. (R. 167).

The deposition of Nollner was taken by stipulation of the parties in Denver, Colorado on June 21, 1950. This deposition showed no collusion on the part of Company or any of its agents in attempting to prevent Nollner from coming to the trial and is a sworn statement by Nollner as contrasted to the letter set forth in Finding of Fact No. 7, allegedly written by Nollner on July 8, 1950, which is contended to indicate collusion.

The present case was tried in District Court on February 7, 8, and 12, 1952. and thereafter the Court took the matter under advisement and allowed counsel to submit briefs. Thereafter on October 22, 1953 (R. 9) the Court ordered judgment be entered for the *Defendant* upon Findings of Fact and Conclusions of Law to be submitted under the rules. Defendant's proposed Findings of Fact and Conclusions of Law were thereupon submitted and Plaintiff-appellee's objections thereto and proposed Findings of Fact and Conclusions of Law were submitted.

On June 22, 1954, the District Court directed that the judgment entered for the Defendant be vacated and that judgment be entered for Plaintiff as prayed for in the Complaint and for counsel to submit form of judgment. Thereafter Plaintiff filed proposed Findings of Fact and Conclusions of Law and Defendant filed objections and Request for Additional Findings of Fact and Conclusions of Law, and Findings of Fact and Conclusions of

Law as finally settled by the Court were signed by the Court on July 6, 1954 and thereafter judgment entered. Whereupon Defendant moved that the judgment be vacated and a new trial be granted and the Findings amended which motion was denied on August 24, 1954, and docketed on August 27, 1954, and Notice of Appeal was filed on September 17, 1954.

A somewhat unusual factor of the case is that a majority of the testimony at the trial was testimony of Company's counsel, Walter Linton, who was also Nollner's Phoenix attorney employed by Company under the policy and incidentally the writer of this brief. The only witness for the Plaintiff at the trial of the District Court action was Mr. Elias M. Romley, attorney for Palmer in the Superior Court action, the District Court action and in this Court.

Specifications of Error Relied Upon

I.

The District Court erred in making Finding of Fact No. 3 for the reason:

a. The last sentence in said Finding fails to set forth the insured's duties as defined in said policy, which was the only evidence as to insured's duties and is therefore contrary to the evidence. The duties set forth in the policy are a condition precedent to the enforcement of any right under the policy. Therefore, said Finding is incomplete and contrary to the undisputed evidence.

II.

The District Court erred in making Finding of Fact No. 7 for the reasons:

a. Said Finding is based upon inadmissable hearsay evidence.

Such evidence was an excerpt from a letter written by Nollner to his daughter, Mrs. Hillyer, referring to alleged statements of Company's Denver attorney and adjuster to Nollner. (R. 277-278)

b. The Fact set forth in said Finding is immaterial for the reason that the trial was reset four additional times and continued three times at the request of Nollner and evidence of failure to attend trial in July 1950 is immaterial since the trial was held on January 11, 1951.

c. Said Finding is contrary to all of the testimony of witnesses Eckroth, Wormwood and Linton, and the testimony of Nollner given in the deposition after the date of such alleged statement.

III.

The District Court erred in making Finding of Fact No. 9, said Finding, except as to the first two sentences thereof, being immaterial, for the following reasons:

a. All matters set forth relate to events after the continuance was denied by the Court and is therefore immaterial.

b. As to that portion of Finding of Fact No. 9 (1), Section 21-802, A.C.A. 1939 requires this identical offer on the part of a party contesting a motion for continuance. Therefore, under the law the offer had been made prior to the denial of the motion for continuance and it is immaterial that the offer was made thereafter.

c. The offered stipulation, labeled "2", is immaterial since said offer was not for the purpose of allowing Appellant to attempt again to have Nollner appear but merely for Appellant to prepare the defense without Nollner's presence.

d. Offered stipulation, labeled "3", is immaterial since a waiver of the jury was after the continuance was denied and further such offered stipulation did not cure Nollner's failure to appear and defend.

e. Offered stipulation, labeled "4", is immaterial since it did not cure Nollner's failure to appear and defend.

f. Refusal of Defendant's counsel to try the case upon the offered stipulations is immaterial since Nollner had breached a condition precedent in the contract, that such breach was material and continued to the time of the trial and prejudice resulted to Appellant from Nollner's failure to appear.

IV.

The District Court erred in Finding of Fact No. 12 for the reasons:

a. An offer of settlement is no evidence of waiver of the breach and, therefore, is immaterial. The offer was not an admission of liability since there was consideration for an offer to dispose of any further liability, which liability included trial in the District Court and this appeal.

b. The last portion of Finding 12 is immaterial since the discussion between appellant and appellant's counsel concerning the motion for New Trial and Appeal does not tend to prove or disprove liability on this appellant.

V.

The District Court erred in Finding of Fact No. 13 for the reason:

a. Said Finding is contrary to the evidence, which did not show that counsel for Nollner was fully and adequately prepared after learning of Nollner's refusal to appear.

b. Said Finding is contrary to the evidence and there was no evidence that counsel for Nollner was at any time prepared to defend the case in Nollner's absence but had specifically advised Nollner that he would withdraw in the event of Nollner's absence.

c. Said Finding is contrary to the undisputed evidence which showed it was impossible to present any defense available to Nollner in his absence.

d. Said Finding is contrary to the undisputed evidence which showed that plaintiff's counsel had threatened certain adverse witnesses would appear, thus making it impossible to properly defend without Nollner's presence to contradict or explain plaintiff's adverse witnesses.

VI.

The District Court erred in Finding of Fact No. 14 for the reasons:

a. Said Finding is contrary to the evidence since the insurance contract specifically required Nollner to attend trial and such requirement was a condition precedent to liability.

b. Such Finding is contrary to the evidence which showed conclusively that Nollner's presence was necessary to refute admissions and explain or contradict stories of possible adverse witnesses.

c. Said Finding is contrary to the undisputed evidence that shows that Nollner's absence was not excusable.

(1) Nollner's statements to Wormwood conclusively showed he could have come to the trial if he had wanted to do so and that he alone decided not to attend and that he would

make future decisions as to whether he would or would not attend the trial.

(2) Nollner's absence at the trial was a voluntary act and is not excusable. Therefore said finding is contrary to the evidence.

VII.

The District Court erred in making Conclusion of Law No. I since said Conclusion is contrary to the evidence.

a. The facts show a material breach of the contract upon which a prejudice can be inferred.

b. There were no facts found by the Court upon which to base the conclusion that the defendant was not prejudiced.

c. Failure of Nollner to appear and defend when inexcusable and a voluntary act, is a material breach as a matter of law and as matter of law the appellant was prejudiced.

d. The last sentence of said Conclusion is contrary to all of the evidence which shows conclusively there was a breach of the cooperation clause of the policy.

VIII.

The District Court erred in making Conclusion of Law No. II for the reasons:

a. Such conclusion is contrary to the undisputed evidence as there is no valid evidence of a waiver on the part of appellant.

b. That the undisputed evidence showed that Nollner did violate the cooperation clause of the policy.

c. Failure to attend the trial by the terms of the policy contract was a condition precedent to liability and the Court has no right as a matter of law to prevent the assertion.

IX.

The District Court erred in making Conclusion of Law No. III for the reasons:

a. That the undisputed evidence shows the assured failed to attend the trial and that such failure breached the insurance contract which prevents plaintiff's recovery thereunder.

b. Appellee-plaintiff's rights to proceeds of the insurance policy are no greater than those of Nollner, the insured.

c. Nollner's breach of the policy was a breach of a material condition and insurer was prejudiced thereby. Therefore, there can be no liability to the plaintiff under the policy.

X.

The District Court erred in making Conclusion of Law No. IV for the reasons:

a. Findings of Fact and Conclusions of Law are erroneous as set forth previously.

b. The co-operation clause of the policy required Nollner to appear at the trial as a condition precedent to liability and Nollner's failure to appear breached the policy, thereby giving appellant at its option the right to terminate any liability under the contract which option appellant exercised.

c. The failure to attend was a substantial and material breach of the policy contract and the appellant was prejudiced thereby.

Summary of Argument

This argument is divided basically into six parts and under six headings.

The first is that the Company used all reasonable diligence to secure Nollner's attendance at the trial. It did what it agreed to do under the policy, that is, offered to pay Nollner's expenses of traveling to the place of trial. It applied for four separate continuances, purportedly to suit Nollner's convenience. Three of the continuances were granted; the fourth was denied. Thereafter counsel withdrew from the case with permission of the trial court. There was no evidence of collusion between the Appellant and Nollner and every effort possible was made to have Nollner present at the trial. The Company went to great expense to point out to Nollner the reasons that his presence was necessary and to warn him of the actions the Company would take if he refused to appear.

The second heading, which logically follows from the first, is that Nollner's absence was absolutely inexcusable. His many wires and requests for continuances always stated he hoped a continuance could be granted and gave some reason related to his job as to why he could not come; however, when it came down to the final questioning, he admitted the day before the actual trial that he had permission from his employer to come to Phoenix for the trial; he admitted he had been offered expenses for the trip and admitted that he alone would decide whether or not it was convenient, and he had made the decision that he did not think it was convenient for him to come to the trial and made the further statement that he alone would decide in the future whether or not he should attend the trial. In other words, his actions and statements show that his failure to appear was because of his own voluntary act and he was prevented by no one from appearing.

Next we take up the fact that Nollner's presence was necessary. Much could be said at this time concerning this phase of the argument. We feel that inasmuch as we are talking about the trial of lawsuits with which this Court is more familiar than the writer, there is no necessity of dwelling at great length on this subject. Nollner was the only eyewitness the Company had to the accident. He was the driver of the car. He knew more about the accident than anyone else and without Nollner the Appellant's position to try the case was not only materially prejudiced but practically impossible of defense. Appellee's counsel, apparently, as he says, to scare Appellant's counsel, threatened the appearance of other witnesses to the accident who had not been located. What was the Company to do but to demand that Nollner be there to explain such stories as might be brought forth by these threatened witnesses? The evidence shows that admissions against interest not previously brought forth were brought into the trial of the cause, which undoubtedly Nollner could have explained.

The next heading gets to the very essence of the case and that is Nollner breached the co-operation clause, which required by the terms of the contract that Nollner appear and attend the trial, and this condition was a condition precedent and is set forth specifically as such a condition precedent to Nollner's rights and to the rights of anyone bringing an action under the policy. There is no question, and it is completely undisputed, that Nollner did not attend the trial. Therefore, there is no question but that Nollner failed to attend the trial and that he breached this condition precedent of the policy. The District Court in its Finding of Fact No. 14 found Nollner's presence under the circumstances was neither required nor necessary. We submit that both words "required" and "necessary" were improper in the Finding, for the policy required his attendance and, as set forth above, his attendance was necessary. In this regard, the Appellate Court has a right to correct findings of the District Court when they are clearly erroneous and the rule of this Circuit

is that a finding is clearly erroneous when, although there is evidence to support it, the Appellate Court is left with a definite and firm conviction that a mistake has been committed.

The Appellant did not waive Nollner's attendance at the trial or his breach of the condition requiring his attendance. After it was apparent that the case would not be continued, that Nollner would not appear, and that, therefore, no adequate defense could be presented, the Company made an offer of settlement as a practical measure to avoid any possible litigation upon the policy. Ample consideration for offer of settlement is apparent. This appeal proves that point.

Nollner's failure to attend the trial was the breach of a material condition of the policy which condition is made a condition precedent. Certainly this is not an inconsequential or immaterial condition but one that goes to the very essence of an automobile liability policy. Such a contract is based upon protecting the assured from a loss due to an automobile accident and the Company in such policies agrees to defend at the Company's expense. Therefore, having a defendant help defend is material to the defense of any lawsuit and is certainly a material condition of the policy. The failure to have Nollner available for the trial undoubtedly resulted in a prejudice to the insurer. The fact that the Company felt that it had a good defense on the facts of the accident and the additional facts that without Nollner's being present, even though his deposition was put in evidence, and judgment was rendered in the amount of $27,500 against Nollner, shows that his absence prejudiced the insurer. The affidavit on behalf of Nollner appearing in Plaintiff's Exhibit 1, R-338, 339, shows that the facts of the accident were decidedly in favor of Nollner; and, yet, with Nollner not in Court after the trial, the Superior Court took the case under advisement for eight days, a judgment was rendered against Nollner and it was the opinion of Appellant's trial counsel that

there was an excellent chance to successfully defend the case had Nollner been present.

Argument

I.

The Appellant Exercised Diligence in Attempting to Secure Nollner's Attendance at the Superior Court Trial.

As has been set forth in the Statement of Facts, the record is replete with the many requests made by Appellant to Nollner, through its agents and attorneys, in attempting to secure Nollner's presence at the trial of the Superior Court action. These efforts commenced in May, 1950 and continued up to the trial time in January, 1951. The record shows the number of registered letters written to Nollner advising him in sufficient time for each trial setting, and each time offering to pay his traveling expense. The Policy (Defendant's Exhibit 30—R. 290) under "Supplementary Agreements" 1. (b), provides:

> "The Company shall reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the Company's request."

Therefore, it is seen that the contract of insurance between Appellant and Nollner provided that Appellant's only duty was to pay expenses incurred by Nollner and not any loss of earnings. There is no contention whatsoever that Nollner ever demanded loss of earnings.

Each time Nollner was advised of the trial date he was also advised of his duties and obligations under the policy. The evidence shows that Nollner realized his duties to the insurer.

Plaintiff-Appellee's attorney does considerable insurance litigation in the Arizona courts and District Court (R. 311) and the District Judge questioned this attorney when he was testifying as follows:

"The Court: If you and Mr. Linton were in opposite places would your testimony be the same?

"The Witness: If the Court please, I don't feel there was any prejudice in this case for many reasons that are contained in this file.

"I think the question of the good faith and bad faith of the defendant enters into it. There is in the file here a statement in October, 1949, from Mr. Jageman to the Berkeley office, October 19, 1949. Mr. Jageman wrote Mr. Nelson:

" 'Our only chance of avoiding litigation is that the Statute of Limitations will expire in just three months and our assured is somewhere in Texas. When attorney Romley contacts us again we will ask for him to list the special damages but this is more of a dilatory action than anything else.'

"Elsewhere in the file references to refusal and sugestions of refusal of the assured to attend indicate in my mind an effort on the part of the defendant in this case, the insurer, to do everything it could possibly think of to avoid a recovery by the plaintiff in this case. I firmly believe that the insured and the insurer colluded to that end." (R. 327, 328)

In other words, the Court was asking Appellee's attorney "If you were representing the insurance company and Mr. Linton were representing the plaintiff, would your testimony be the same?" The answer given by Mr. Romley definitely shows that he did not answer the question and it is submitted that there is good reason therefor. For, we submit that under the evidence in this case, it is shown that the insurance company exercised all diligence required of it to have Nollner present at the trial of the case.

In citing the above testimony of Mr. Romley, there appears in it his argument that there is an inference of collusion on the part of the insurance company. We submit that there is no evidence of collusion and that the evidence completely refutes this contention. The only other item in the record is the Finding of Fact No. 7 of the District Court which in effect states that this hearsay testimony, which is in effect "hearsay upon hearsay", is that Nollner could not afford to jeopardize his work and that whatever happened he should stay in Denver, since he could not possibly spend a week away from Denver at that time. Let it be borne in mind that this alleged statement which was objected to at the trial as "hearsay" was made purportedly on July 8, 1950, at which time Nollner had previously requested continuance until after July 1. The matters contained in Finding of Fact No. 7 must necessarily relate to the first trial setting of June 1, 1950. This alleged fact was refuted by both Attorney Wormwood of Denver and the adjuster Eckroth of Denver, at the trial of the cause. However, this Finding is immaterial as to what happened at the later trial setting dates and certainly is not evidence of collusion. Therefore, we submit that the Statement of Facts and exhibits and records supporting the Statement of Facts shows, beyond a question, that the Appellant did exercise all diligence that could have been required of it to have Nollner present at the trial. Certainly, as we will discuss later, we submit that his presence was necessary.

II.

Nollner's Absence from the Trial Was Inexcusable

There are several cases holding that where the assured's absence from the trial is excusable that that is not lack of cooperation on the part of the assured. Those present unusual factual situations which have no relevancy to the issue involved. We feel that the following testimony by Kenneth Wormwood, which is uncontradicted and is substantiated by the evidence set

forth in Defendant's Exhibit 25, R. 248, definitely proves that Nollner could have attended the trial had he wanted to.

"Q. At the time of January 10—I don't recall that I asked you—you did request Mr. Nollner to come to Phoenix for the trial of January 11?

"A. I did, sir.

"Q. Did he agree to come?

"A. No, he did not.

"Q. Did he state he would not come or could not come?

"A. He stated that it had been left up to his discretion as to whether he should come or not and he said in his discretion he would not come at that time.

"Q. And did you ask him if there was any assurance that he would come at any future time?

"A. I did, sir.

"Q. And what was his answer to that?

"A. He stated if it fitted to his work, all other things being equal, he would come. If it didn't fit to his work he wouldn't come.

"Q. And did he state to you or did you ask him whether or not—who would be the one or whether he would be the one to determine about his work?

"A. He said he would be the one who would determine that.

"Q. In other words, he said he would determine whether or not it was convenient for him to come?

"A. That is right.

"Q. That was after your knowledge of a few continuances?

"A. Yes.

"Q. He gave you no assurance he would come at a later date?

"A. No assurance he would ever come.

"Q. At that time I believe you stated that you did offer and tender expenses and plane fare for him to come there?

"A. Yes, and other expenses as well.

"Q. Mr. Ekroth was present at the time of that court reporter's statement?

"A. Yes.

"Q. Did you advise him if he refused to come what would be the consequences?

"A. Yes.

"Q. What did you tell him, as best you can recall?

"A. My recollection is I called his attention to the general policy terms regarding cooperation, advised him if he refused to attend the trial the company could withdraw and that there might be default judgment entered against him.

"Q. Did you on January 11 in your knowledge advise him that I was going to withdraw from the trial of the case?

"A. I did that on January 11.

"Q. You wrote him a letter, did you?

"A. Yes, I did, sir." (R. 251-252)

Thus it will be seen that Nollner himself determined whether or not he would come to the trial and he gave no assurance that he would ever come at a later trial date. In Defendant's Exhibit 25—R. 248, the following quotation is observed:

"Q. Now, as I understand it, you could go if you wanted to; that is, your commander has indicated that he will leave it up to you, is that correct?

"A. That is correct.

"Q. And your decision is that you are not going?

"A. That is correct.

"Q. And we have no assurance that you would go at any future time if there was another continuance?

"A. If it fitted to my work, all others things being equal, I might consider it.

"Q. But if it didn't fit your work you would not go the next time?

"A. That is correct.

"Q. And you will be the one to determine whether it fits your work?

"A. That is correct." (R. 248)

Thus it is shown that he had permission from his employer to come to the trial and the employer had left it up to him and he had decided it did not fit in with his work and that he was the one who had made such determination and that the decision not to come was Nollner's and no one else's. It is shown that expense money was tendered to him and that he had on January 8 made plans to fly to Phoenix for the trial and then cancelled those plans.

In the case of *Hartford Accident & Indemnity Co. v. Partridge,* 183 Tn. 310, 192 S.W. 2d 701, the assured did not appear at the trial on the morning of the trial. The court refused to grant continuance but postponed the hearing until that afternoon. Company attorneys were not able to locate the assured and withdrew because of failure to co-operate. It was determined later that the

assured had become intoxicated and for that reason did not appear at the trial. The Court in that case stated:

> " * * * In more than one of these cases a showing of 'manifest indifference' is recognized as the equivalent of a refusal to co-operate. It can hardly be said that 'indifference' was not manifested by the course of conduct of the insured. * * * "

Certainly the least that can be said for Nollner's refusal is that it was a manifest indifference which was the equivalent of a refusal to co-operate.

Thus we contend that Nollner's failure to attend the trial was of his own volition, not caused by any act of Appellant or his employer, and it had been pointed out to him many times as to what would happen in the event he failed to appear, namely, that judgment probably would be taken against him and that the Company would withdraw from the case. Apparently from the facts we can infer that Nollner did not care what would happen to him or the Appellant and certainly from the facts there should have been a finding that Nollner refused to attend the trial and therefore his absence was inexcusable.

III.

Nollner's Presence Was Necessary at the Trial of the Superior Court Action

As the record shows, this is a case wherein Nollner was the driver of the insured vehicle which was involved in an accident on U. S. Highway 80, west of Phoenix, Arizona, with a vehicle driven by a person referred to as "Height" in the testimony. The facts are that Nollner was traveling in a westerly direction and prior to the collision Height had been traveling in an easterly direction and Height cut across the road in front of Nollner and thereafter the collision resulted. (Plaintiff's Exhibit I-R. 338-339). The record shows that attempts were made on behalf

of Appellant to locate Mr. Height who apparently had made his presence inconspicuous inasmuch as death had resulted from the accident. The record shows there were other witnesses to the accident which may or may not have been favorable to Nollner, who were known to the insurer.

As appears from the record, Mrs. Palmer's counsel, approximately six weeks prior to the trial, threatened Appellant's counsel that he was going to have as a witness the Mr. Height above referred to. (R. 180-181). Thus the insurer was faced with the defense of an action where the only witness to appear on its behalf was Ralph E. Nollner, with the possibility that adverse witnesses would be produced and give damaging testimony. From the facts of the accident set forth in the affidavit for continuance, it will be seen that Nollner was proceeding west and, according to his testimony, the Height truck cut suddenly in front of him, thereby causing the accident. There was the ever present possibility that Height, if present, might well testify to a different set of facts, particularly, he might set forth that he gave a proper hand signal; that Nollner slowed down as though he were going to give Height the right-of-way, and that suddenly Nollner speeded up again, or some other such story as to indicate negligence on the part of Nollner. There was also the ever present possibility that certain statements against interest might be claimed by other witnesses to have been made by Nollner.

Appellee below placed considerable emphasis on the fact that the deposition of Nollner was not taken by Appellant prior to the trial, and Finding of Fact No. 6 sets forth Appellee's contention, showing that a deposition was taken upon stipulation at his request on July 21, 1950. This contention of Appellee overlooks the following: he would have to contend, to sustain that argument, that Appellant knew at all times from the date of July 21, 1950 that Nollner was not going to attend the Superior Court trial. That is not according to the record. Additionally, any

practicing attorney knows that the deposition of a party is never as effective as having the person present, for many reasons. Thus, this argument would indicate that a refusal had been made by Nollner sometime in or prior to July, 1950. Witness the motions for continuance in December and January, and witness the fact that Nollner actually advised Appellant's counsel two days prior to the trial that he would be in Phoenix. It was always the hope and understanding that Nollner would appear at a trial at a future date until the contrary was learned on January 10, 1951. It was not until January that the facts appeared from Attorney Wormwood's statement and from conversations which were learned after the trial showing that there was actually a refusal on the part of Nollner. Therefore, we submit there was never a duty on the part of Appellant to take the deposition of Nollner and it is our further contention that that was not what the policy contemplated when it stated that the assured shall co-operate in giving evidence and attending trials.

The record in the District Court shows that Mr. Romley testified that there were a lot of cases where the only eyewitness, the assured, was not available for the trial and cited where the driver and assured was killed. This, of course, is an excusable absence, although it certainly does handicap the defense of the action, and the Policy, to provide otherwise, would have to obliterate the line between existence on this earth and existence in the hereafter.

Many cases have discussed the necessity of the presence of an assured at the trial of an action. For example, we would like to point out to the court the case of *Fischer v. Western & Southern Indemnity Co.,* 106 S. W. (2d) 490, where the court was talking about an assured who was not an eye witness to the accident but merely the owner of the equipment, and that Court states as follows at page 494:

> "Conceding that the assured had not been an eyewitness to the accident, the fact still remains that he was the owner of the truck involved in the accident, the employer of the

driver of it, and the actual defendant in the action. Of course, the garnishee had no way of foretelling what actual need it might have for the counsel and suggestion of the assured during the progress of the trial, but it nevertheless had the right, under the terms of the policy, to insist upon his attendance at the trial so as to have the benefit of his assistance and cooperation in meeting whatever emergencies might arise. Indeed, as was aptly said in Bauman v. Western & Southern Indemnity Co., supra: 'His mere presence as defendant at the trial would have been sufficient to show that he had faith in the defense being made in his name and in his behalf, whereas his absence might, and probably would have, led the jury to infer his lack of faith in, or lack of sympathy with such defense.'

"The assured's material and unexcused lack of co-operation having appeared as a matter of law, and there being no room in the case for any suggestion of fraud or bad faith on the part of the garnishee, it follows that a verdict for the garnishee should have been directed at the close of the entire case."

Further in the case of *Bauman v. Western & Southern Indemnity Co.* 230 M.A. 835, 77 S.W. 2d 496, the facts of which case are similar to the present case and wherein there was a continuance so that the assured could appear and the assured then failed to appear on the continued date and the company attorneys withdrew from the case setting forth the failure to co-operate as a reason for withdrawal in that case, the insured was not an eye witness, yet the court had this to say, at page 501:

"Neither respondent nor any one else could reasonably say in advance of the trial that Baird's absence from the trial would be immaterial, nor can any one now say his absence would have been immaterial. Many things occur during the course of the trial of a contested damage suit which no one can foresee prior thereto. Witnesses sometimes forget facts and sometimes fail to appear; sometimes they give testimony at variance with statements made prior to the trial. Any number of incidents might be mentioned to show the unquestionable importance to the appellant of having Baird himself in court for quick

and ready conference to meet emergencies arising during the trial. Baird himself, although not regarded as a material witness before the trial, may during the trial have become a very important witness in rebuttal with respect to statements made to him by witnesses."

The record shows that one Frank Harmonson, a brother of the plaintiff-Appellee, testified that on the hospital steps shortly after the accident, Nollner stated that he was responsible for the deaths of three of the finest women in the world. At that time it appeared that not only Mrs. Nollner would die, but also his daughter, Mrs. Hillyer, and Mrs. Palmer (R. 184-185). Certainly the presence of Nollner was necessary to refute such an alleged admission or at least to explain what he meant by such statement and not having him available for an incident that actually did take place in the trial showed that Nollner's presence was necessary.

It is submitted that Findings of Fact 13 and 14, stating that his presence was not necessary and his absence was excusable and that the defendant was fully and adequately prepared to present a defense and proceed to trial in his absence, is clearly erroneous. First, as we submitted under division II of the argument, his absence was not excusable and there is no evidence in the record to sustain such finding. Second, we state that the facts set forth above show that the presence of Nollner was necessary to a proper defense of the action.

There are numerous cases in the United States Court of Appeals in various Circuits, setting forth the rule as to the right of the reviewing court to view the evidence to see if the finding is clearly erroneous. We cite the case of *Home Indemnity Company v. Standard Acc. Ins. Co.,* 167 F. 2d 919 at 923, which sets up the defense of when a Finding of Fact is clearly erroneous.

"From the foregoing, it will be seen that the *fact* that White's five statements were made is not disputed. The court found, however, that the appellant 'has not been in anywise prejudiced by an action or statement or omission of George White.' This

is a conclusion of law, or, at most, an inference from undisputed facts, which we are in as good a position to make as was the trial court.

"In United States v. United States Gypsum Company, 68 S. Ct. 525, page 541, the Supreme Court, in dealing with a situation comparable to that which confronts us here, said:

" 'Insofar as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts, heretofore described or set out, Rule 52(a) of the Rules of Civil Procedure (28 U.S.C.A. following section 723c) is applicable. That rule prescribes that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where "clearly erroneous." The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. *A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.* * * *

" 'Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous'." (Emphasis ours)

This Court has the right to and can find from the entire evidence that a mistake has been made and set aside the Findings as clearly erroneous.

IV.

Nollner Breached the Co-operation Clause of the Insurance Policy.

There is set forth in the second paragraph of the Statement of Facts the insured's duties in case of a loss and the paragraph relating to "Action Against Company." Both portions of the insurance contract provide that as a condition precedent to the enforcement of any right by the insured or as a condition precedent to the bringing of any action against the Company, the insured should have fully complied with the terms of the policy which include "3 (c). Assist and Co-Operate with the Company in investigating, securing and giving evidence * * * and by attending hearings and trials." Perhaps the leading case on this subject as to the rule of construction of such a clause is a New York case where the opinion was written by the then Judge Cordoza, which has been cited by nearly every court that has taken up a case of this nature, that is, *Coleman v. New Amsterdam Casualty Co.*, 247 N. Y. 271, 160 N. E. 367. In that case, the insurance company insured a drug store under an errors and omissions policy regarding the filling of prescriptions. After suit was filed the secretary of the insured corporation merely stated a mistake had been made and refused to say anything more unless the insurance company would undertake to pay any judgment against him and his corporation. When the attorney for the company refused to enlarge the liability, the secretary announced he would neither sign an answer nor tell anything he knew. Later a request was made by the insurance company for some officer to verify the answer and later for a conference as to the merits, and both requests were ignored. Thereafter the company gave notice and disclaimed liability. Judgment was taken by default and assured was adjudicated a bankrupt. This action was by the plaintiff in the original suit against the insurance company of the drug store. In that case Judge Cordoza stated as follows:

"The question remains whether the conduct of the assured was such a refusal to co-operate as to vitiate the policy. We are satisfied it was. Co-operation does not mean that the assured is to combine with the insurer to present a sham defense. Co-operation does mean that there shall be a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a genuine defense. The attitude of this assured was one of willful and avowed obstruction. It did not deny that it was in a position to give information, material and instructive, in aid of an investigation of the grounds of liability. It affixed to the disclosure of whatever information is had an untenable condition, the assumption by the defendant of an obligation not covered by the contract. The insurer was not required to content itself with an unexplained admission that a mistake had occurred, when, coupled with the admission, there was a refusal to say more except at a price. The cause and occasion of the mistake were facts undisclosed, yet important to be known. The drugs or their containers might have been misbranded by the manufacturer or by some one else. The ingredients might have been harmless. In divers ways, there might be defense to a charge of negligence, or at all events palliation, though mistake were conceded. The default of the assured was more than sluggishness or indifference, phases of thought and conduct that might be the subject of varying inferences when considered by a jury. It was so avowed and purposed that but one inference is possible. If this was co-operation, one is at a loss to imagine when co-operation could be lacking.

"The plaintiff makes the point that the default should be condoned, since there is no evidence that co-operation, however willing, would have defeated the claim for damages or diminished its extent. For all that appears, the insurer would be no better off if the assured had kept its covenant, and made disclosures full and free. The argument misconceives the effect of a refusal. Co-operation with the insurer is one of the conditions of the policy. When the condition was broken, the policy was at an end, if the insurer so elected. The case is not one of the breach of a mere covenant, where the consequences may vary with fluctuations of the damage. There has been a failure to fulfill a condition upon which obligation is dependent."

To sum up the holding of this case, which incidentally has been followed by this Honorable Court in the case of *Home Indemnity Company v. Standard Acc. Ins. Co.,* supra, it states that when a condition precedent is breached by the assured, the policy is at an end if the insurer so elects.

This holding was presented by this Honorable Court in the case of *Royal Indemnity Co. v. Morris,* 9 Cir., 37 F. 2d 90, 92, and was cited in the *Home Indemnity Co.* case, supra, as follows:

> "In Royal Indemnity Co. v. Morris, 9 Cir., 37 F. 2d 90, 92, the late Judge Dietrich said:
>
> " 'Appellee argues that, notwithstanding Gomez, refusal to defend, the insurance company might have protected itself by intervention. But while intervention might have afforded it a measure of protection, clearly in that position it would be at a disadvantage; *and besides we are here discussing, not the question whether in spite of Gomez' default the insurance company could have protected itself, but whether he forfeited his rights by violating a material condition of the policy.*' (Emphasis supplied)
>
> "Perhaps the leading case on this subject is Coleman v. New Amsterdam Casualty Co., supra, 247 N. Y. 271, 160 N.E. 367 at page 369, 72 A.L.R. 1443."

The Arizona Supreme Court, although not having directly decided a question such as this under the lack of co-operation clause, has in its decisions concerning failure of the insured to perform certain duties under an insurance policy, followed the same rule. The Arizona Court in the case of *Watson, et al, v. Ocean Accident & Guarantee Corporation, Ltd.,* 28 Ariz. 573, 238 P. 338 at page 340, states as follows:

> "If the failure to give notice as provided for in the policy is expressly made a ground of forfeiture, of course the plain language of the contract governs, and generally, though not in all jurisdictions, *there can be no recovery when giving of the*

notice, in time and manner as specified in the policy, is made a condition precedent to liability. White v. Home Mut. Ins. Co. 128 Cal. 131, 60 P. 666; Teutonia Ins. Co. v. Johnson et al., 72 Ark. 484, 82 S. W. 840; Davis et al, v. Northwestern Mut. Fire Ass'n, 48 Wash. 50, 92 P. 881, 15 Ann. Cas. 333." (Emphasis supplied)

Later the Arizona Supreme Court in another case on an insurance policy, *Massachusetts Bonding & Ins. Co. v. Arizona Concrete Co.* 47 Ariz. 420, 56 P. 2d 188 at 192, where failure to give notice of the accident was brought forth, stated:

"Bonds of this nature should be construed fairly in accordance with their terms, and we will not rewrite them for the benefit of either party, but neither will we sustain a claim of forfeiture for failure to comply with their conditions subsequent, *unless the contract itself expressly so provides, or it appears affirmatively that such failure has damaged the insurer.*" (Emphasis supplied)

In this last Arizona case, it will be noted that the policy did not provide that failure to give notice was a condition precedent to liability.

In *Berry v. Acacia Mut. Life Ass'n.* 49 Ariz. 413, 67 P. 2d 478 the Arizona Supreme Court discussed the following question:

"When the policy requires that notice be given of a claim of disability before default in the payment of the premium, is such notice within the time prescribed a condition precedent to recovery upon the policy?"

The Court in effect follows the holding of the *Coleman v. New Amsterdam Casualty Co. case,* supra, and states as follows at page 481:

"As to the third question in the very recent case of Bergholm v. Peoria L. Ins. Co., 284 U.S. 489, 52 S. Ct. 230, 76 L. Ed. 416, this precise issue was raised, and the court held, under the

terms of a policy almost identical with the one in the case at bar, that in order to take advantage of the benefits of the policy, proof must be made before the premium was in default—in this case before the 4th day of March. *Contracts of insurance must, of course, be construed according to the terms set forth therein, when those terms are plain and unambiguous. We think the condition in regard to the necessity of proof as a condition precedent to liability for benefits is clear.* The soundness of life insurance companies depends upon the premium being sufficient in amount and time of payment to meet the actuarial requirements. *These conditions are therefore, of the very essence and substance of the policy, and even a court of equity cannot grant relief for a failure to comply* with the explicit and stipulated requirements of the policy setting up a condition precedent to the granting of any relief in the payment according to its strict terms. Klein v. New York L. Ins. Co., 104 U.S. 88, 26 L. Ed. 622; Bergholm v. Peoria L. Ins. Co., supra. *We hold, therefore, that it was a condition precedent for the plaintiff to give notice and proof of his disability* before his premium was in default in order that he could recover for his disability. As a matter of fact, plaintiff does not seriously contend that this is not the law, but he does urge that there is one exception to the rule, which is that when, through some reason for which the policyholder is in nowise to blame, it is impossible for him to make proof within the precise time required by the policy, he is allowed a reasonable time thereafter in which to do so." (Emphasis supplied)

Thus the Arizona Supreme Court goes on record as holding that the condition precedent must be complied with before there is any liability under the policy.

The terms of the policies in Arizona cases above set forth did not in any of them provide that the things complained of were a condition precedent, where in this particular case there is the contract that co-operation by the insured is a condition precedent and that no action shall lie against the Company unless as a condition precedent the insured shall have fully complied with all of the terms of the policy.

The New Jersey Court in the case of *Whittle v. Associated Indemnity Corporation,* 130 N.J.L. 576, 33A. 2d 866, ruled in a case where the insured's son and driver disappeared, that the failure to give notice was a condition precedent and that the construction and effect of the contract is a matter of law to be determined by the Court and parallels the holding in the *Home Indemnity Co. of New York v. Standard Acc. Ins. Co.* case, supra, that the function of the Court is to enforce a contract as it is written and that if the insured cannot bring himself within the conditions of the policies he is not entitled to recover for the loss.

It is a well-settled rule that the rights of the Plaintiff-Appellee in this case can rise no higher than that of the insured. The New Jersey Court in the *Whittle* case stated as follows:

> "The 'construction and effect of a written instrument is a matter of law to be determined by the court and not by the trier of fact.' And in the absence of an infirmity in a contract (none is here alleged) our 'function' is to 'enforce a contract as it is written.' And if the 'insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss.' Cf. J. C. Ries & Sons, Inc. v. Automobile Insurance Co. of Hartford, Conn., 121 N.J.L. 493, 496, 3 A.2 610, 612. * * *"

This same ruling is followed in numerous other cases. Some of the leading cases are *Glens Falls Indemnity Co. v. Keliher,* 88 N. H. 253, 187 A. 473; *Curran v. Connecticut Indemnity Co.,* 127 Conn. 692, 20 A. 2d 87; *Hartford Accident & Indemnity Co. v. Partridge,* supra; *Whittle v. Associated Indemnity Corporation,* supra. In the case of *Glens Falls Indemnity Co. v. Keliher,* the Supreme Court of New Hampshire stated as follows:

> "A breach of condition is no less decisive in its effect than a breach of warranty with reference to which we have recently stated the law as follows: 'It may be taken as still law in New Hampshire that if a fradulent statement in an application is to be regarded as a warranty, the question of "materiality"

is not one of fact for the jury, but one of law for the court in determining whether the statement is material in the sense that it was intended by the parties to be a part of the contract. This view restricts the question to one of construction of the policy itself.' Omoskeag Trust Co. v. Prudential Ins. Co. (N.H.) 185 A. 2, 6. In other words, while the law may disregard trivial and innocent breaches of condition, and while the character of the assured's conduct and the importance of its probable effect upon the interests of the insurer may be considered for the purpose of determining whether there has been a substantial breach, all questions of actual harm and probable effect become immaterial when a breach of condition has been definitely established."

" * * * Since the only obligation of the company to pay the judgment in Mrs. Adams' suit was subject to the conditions of the policy, and since a breach of a material condition has been established, it follows that the obligation of the plaintiff with reference to her judgment is at an end, and the plaintiff is entitled to judgment in this proceeding, in accordance with the first prayer of its petition."

You will note in that particular case the Court holds, which seems to be the majority opinion, that the question of materiality is a question of law for the Court and that all questions of actual harm and probable effect are immaterial when a breach of condition has been definitely established.

In the case of *Curran v. Connecticut Indemnity Co.,* supra, the Supreme Court of Errors of Connecticut held as follows at page 89:

"It is true that the condition of co-operation with an insurer is not broken by a failure of the assured in an immaterial or unsubstantial matter. Rochon v. Preferred Accident Ins. Co., 118 Conn. 190, 198, 171 A. 429; 72 A.L.R. 1455; 98 A.L.R. 1469. In determining whether a condition to co-operate has been broken, we are dealing with contract rights, and if there has been a breach, prejudice need not appear. Coleman v. New Amsterdam Casualty Co., supra. The reason why immaterial

and unsubstantial failures of an assured do not constitute a breach is because they are not included within the fair intendment of the requirement that the assured co-operate, and lack of prejudice to the insurer from such failure is a test which usually determines that a failure is of that nature. Conduct on the part of an assured which makes it impossible for the insurer to get in touch with him in the face of an impending trial, although diligent search is made for him, could rarely, if ever, be regarded as an unsubstantial or immaterial failure to co-operate."

In the case of *Hartford Accident & Indemnity Co. v. Partridge, supra,* the assured became intoxicated and did not appear for the trial. The court discusses the same rule of law and states in that regard as follows:

"There can be no question that the condition of the contract of insurance above recited is valid and binding upon both the insured and the complainant below, whose rights are derivative, rising no higher than those of the named insured under the policy contract, she being entitled to recover only 'in the same manner and to the same extent as the insured'.

"In the recent case of Horton v. Employers' Liability Assurance Corporation Limited, 179 Tenn. 220, 224, 225, 164 S.W. 2d 1016, 1017, this Court, citing annotations from A.L.R. and other authorities, said:

" 'The provision of the policy requiring the assistance and cooperation of the insured in the defense of any suit brought by a third party to recover under the policy is valid, in the absence of any statute to the contrary. Annotation, 72 A.L.R. 1448, annotation 98 A.L.R. 1465. The provision is a condition precedent, failure to perform which, in the absence of waiver or estoppel, constitutes a defense to liability on the policy. Bachhuber v. Boosalis, 200 Wis. 574, 229 N.W. 117; Coleman v. New Amsterdam Casualty Co., 247 N.Y. 271, 160 N.E. 367, 72 A.L.R. 1443. In Watkins v. Watkins, 210 Wis. 606, 245 N.W. 695, 698, the court said: "Policies containing covenants the same as or similar to those contained in this policy have been so often sustained that the question

should be considered at rest," and added that "if insurers may not contract for fair treatment and helpful cooperation by the insured, they are practically at the mercy of the participants in an automobile collision." ' "

and at page 706:

"While it is held in some cases that a mere showing of absence from the trial does not of itself conclusively establish a breach of the obligation to co-operate, the cases agree that where there is proof of a request for attendance and notice of the time of trial, refusal or failure to attend constitutes a breach and, unless waived, absolves the insurer from liability. This is the substance of the holdings in the cases annotated in 72 A.L.R. pp. 1469 et seq., and 98 A.L.R. pp. 1476 et seq.

"While on the special facts of some cases absence from the trial has been excused, we are cited to no case, and have found none, where, having full notice of the trial and having been requested to attend and having promised to do so, and being in the immediate locality, a defendant eye witness of the accident and party to it, failed to attend and a recovery has been allowed on the policy. Indeed, we have found no case where the 'excuse' relied on was of the character here offered; no case where the absence was the result of intoxication, or of an injury incident thereto."

Noting the last paragraph of the quotation from the Supreme Court of Tennessee, we feel, as the Court did in that case, that the majority of cases unquestionably hold that where the assured had full notice of the trial, was requested to attend and promised to do so and, being able to do so and being an eye witness and a party to the accident, fails to attend, there can be no recovery against the insurance company. We relate back to the fact that we feel Appellee's counsel in answer to the District Judge's question was unable to make a direct answer for the same reason that had he been representing Appellant, he could have done no more than was done by Appellant or Appellant's counsel in this case and that he would have done the same as was done by Appellant and Appellant's counsel.

The Court of Errors and Appeals of New Jersey in the case of *Whittle v. Associated Indemnity Corporation,* supra, restated this rule, that when a condition precedent of the policy is unfulfilled, the insurer may terminate the liability under the policy for a failure to fulfill the condition.

> "And if the test were that it must be shown that the failure to fulfill the conditions precedent prejudiced the insurer, the trial judge might well have been justified, under the proofs, in submitting the case to the jury. But that is not the test. The test is: Was a condition precedent of the policy unfulfilled by the assured? If it was then, if the insurer so chooses and it did so choose, the policy is at an end (cf. Kindervater v. Motorists Casualty Ins. Co., supra, 120 N.J.L. at page 376 et seq., 199 A. at pages 608,609), for 'there has been a failure to fulfill a condition upon which (insurer's) obligation is dependent.' Coleman v. New Amsterdam Casualty Co., 247 N.Y. 271, 160 N.E. 367, 369, 72 A.L.R. 1443."

Appellant respectfully submits to this Court that the evidence conclusively shows that Nollner breached the co-operation clause of the policy, that the Appellee did not show that all of the terms of the policy had been fully complied with and that such a showing was a condition precedent to action against the company, and that Nollner's inexcusable failure to attend the trial was such a breach that there can be no recovery in this action against the appellant.

V.

Appellant Did Not Waive Nollner's Failure to Appear

As soon as it was finally determined that Nollner would not appear for the trial and that a continuance was not going to be granted and was refused by the Superior Court, Appellant immediately withdrew from the case. Appellee contended below apparently that his offer that the trial be continued three or four days which was not accepted by Appellant, indicates that there

was a desire to terminate and disclaim. At the time these statements were made, the motion for withdrawal of counsel was being argued. The Court had previously overruled the motion for continuance. The testimony is as follows: (Defendants Exhibit 22, R. 125-127)

"Mr. Romley: Mr. Linton, I believe you were in communication with Mr. Nollner by long distance telephone on Tuesday of this week, January the 9th, at which time you advised him that the cause would be reached for trial on the morning of January the 11th, is that correct?

"Mr. Linton: That is true.

"Mr. Romley: At that time the defendant informed you that he intended to appear and testify in the trial?

"Mr. Linton: He told me at that time that plane reservations were made, and he expected to be here, but if he changed his mind he would advise me the following day, which he did.

"Mr. Romley: Then you on that day, January the 9th, caused to be issued two or three subpoenas for witnesses to appear at the trial, did you not?

"Mr. Linton: Yes, there were subpoenas issued, preparation made for the trial on behalf of the defendant.

"Mr. Romley: And full preparation was made for the trial except for a final conference with the defendant?

"Mr. Linton: That is right.

"Mr. Romley: And were the defendant present right now, you would proceed with the trial, would you not?

"Mr. Linton: Should the defendant appear, I probably would be in a position to represent him. I would have to have a short continuance since he has said he wouldn't appear and, of course, my trial preparations have been laid aside.

"Mr. Romley: Your trial preparations have been completed, though?

"Mr. Linton: It is a hard question to answer. I don't know whether it is or not.

"Mr. Romley: Do you now wish a slight continuance of three or four days?

"Mr. Linton: I have made my application for continuance. It has been denied. I don't think I have any right to go any further and overrule the Court's orders.

"Mr. Romley: That is all.

"The Court: Mr. Linton, I feel that this case has been postponed at least once, and perhaps in disregard of the statute. The statute, apparently, in mandatory language uses the word 'shall.' As far as the continuance is concerned, I feel that the plaintiff has a right to have his cause heard." (R. 125-127)

The review of Defendant's Exhibit 22 leading up to the testimony cited, shows that the continuance had been denied by the Court and that Appellant's attorney was arguing his motion for leave to withdraw. These questions were asked by Appellee's attorney of Appellant's attorney. The Court in its remarks indicated that the postponement had been in disregard of the statute and we submit that the offer of continuance was not for the purpose of allowing Appellant to attempt to have Nollner present but for the purpose of forcing Appellant to trial without Nollner with the offer of a three or four day continuance. These facts are somewhat summarized in Finding of Fact No. 9 and we believe that our conclusion is sound, inasmuch as the proposed Finding of Fact offered by Plaintiff (R. 23) contained Finding of Fact No. 9, which stated that Defendants' counsel had offered to stipulate: "(2) That the trial be continued for three or four days to enable Nollner to be present." This was objected to by Appellant in paragraph 7 of Objections, and the Findings as fin-

ally adopted by the Court deleted the words "to enable Nollner to be present."

The Supreme Judicial Court of Massachusetts in *Goldstein v. Bernstein et al* 315 Mass. 329, 52 N.E. 2d 559, ruled on a question closely allied. In that case the attorney for the company secured a continuance to March 1 so the assured could make a trip to Florida and the assured advised she could not return to New York on the date the trial was set but would be one day late and demand was made that she be there on time. When the trial was reached, the assured not being present, the counsel withdrew. The court stated in that case as follows at page 562:

> "The insurance company was acting in good faith and was justified in disclaiming liability. The judge properly excluded evidence that counsel for one of the plaintiffs would have been willing to grant a continuance when the case was reached for trial if requested to do so by the attorneys for the insured. The record shows that counsel for another plaintiff requested that the judge assess damages following the default of the insured. The company was not required to request or to assent to a continuance when the insured failed to appear. Such conduct might have later subjected it to a claim of waiver or estoppel. See Goldberg v. Preferred Accident Ins. Co., 279 Mass. 393, 399, 181 N. E. 235."

Furthermore, it appears rather definitely that there was no question but that Nollner would not ever come to a trial at any time unless it suited his convenience and his convenience had not been suited for the past four trial settings and it would appear that it would be absurd to state to the Court that a continuance was wanted for that purpose when it was obvious that Nollner never had had any intention at all of appearing at the trial of the case. In Finding of Fact No. 9 in which it is stated that "1. That Nollner if present at the trial would testify that the facts were as recited in the affidavit of counsel," this was another offered stipulation. In this regard, we should like to point out that *Section 21-802 A.C.A. 1939,* requires this identical offer on the

part of a party contesting a motion for continuance and the statute further provides that if the party makes the offer that the facts set forth in the affidavit would be testified to by the party or witness that the continuance shall be denied. Therefore such an offer after denial of motion for continuance is certainly immaterial.

The third item of Finding of Fact No. 9 offered on the part of Plaintiff's counsel is "3. That a jury be waived and the cause tried to the court." The trial to a jury under the circumstances would have been considerably more prejudicial than a trial before the court; nevertheless, there was the breach of the condition precedent in the policy which required Nollner's attendance whether the case be tried before the court or a jury. We cannot overlook that the Court decides a case on the same facts as a jury, and without Nollner present to state his case, or refute or explain testimony of witnesses that might be produced or were produced, is, to say the least, a handicap which Appellant contends was actually an unsurmountable handicap. As was stated by the Massachusetts Court in *Goldberg v. Preferred Acc. Ins. Co. of New York, 279 Mass. 393,* 181 N. E. 235, at pages 237 and 238:

> "The attorney who was to try the case was justified in feeling that an interview with Costa was indispensable to proper preparation for trial, and that his presence and assistance in court at the trial were essential to the defense. A refusal on Costa's part, due to personal reasons not material to the defense of these cases, would constitute lack of co-operation. Coleman v. New Amsterdam Casualty Co., 247 N.Y. 271, 160 N.E. 367, 72 A.L.R. 1443."

As is well known by all who try contested litigation, the lack of a material witness, whether a party or merely a witness, is a severe handicap and many times will result in loss of the case rather than a successful action.

On cross-examination, Appellant's counsel testified as follows in the District Court:

"A. We were negotiating there, Mr. Romley, on that point. I still wish he had been there. I think we would have done all right.

"Q. You think you would have won, do you?

A. If he had been here personally I think we would have had an excellent chance.

Q. Do you think you would have won if you had proceeded to trial that day in his absence?

A. No."

(R. 167)

We think there is no dispute on this in the record, for certainly Mr. Romley never testified that we would have won the case if we had proceeded to trial in Mr. Nollner's absence and he gave no opinion in his testimony that our defense was good without Nollner present. We almost feel that it is a matter of judicial notice that the absence of a material eyewitness who is a party results in prejudice to the insurer.

The same points above mentioned would go to counsel's offer No. 4 in Finding of Fact No. 9, to the effect that his deposition be received in evidence without objection. This, of course, again is when he was arguing against withdrawal of Appellant's attorney from the case and for the same reasons above set forth, the deposition would be of no more help than the affidavit attached to the motion for continuance since it had none of the elements necessary of cooperation or assistance of a material witness in helping to explain or rebut adverse testimony. To show the great benefit of Nollner's deposition, we merely refer to Findings of Fact Nos. 10 and 11, which show during the course of the default trial Nollner's deposition was offered and received in evidence and Plaintiff received a judgment in the amount of

$27,500. Therefore, what was the benefit of offer No. 4? We feel that this substantially helped the testimony of the writer set forth above, that the case could not have been won without Nollner present personally, whereas the facts of the accident, as set forth in the motion for continuance, certainly show there was a legitimate defense. (Plaintiff's Exhibit I, R. 338-339).

Appellant feels that the Court below erred in Finding of Fact No. 12. The only evidence to support that Finding of Fact is that an offer of settlement was made after the motion for continuance had been denied and before the motion for leave to withdraw had been heard by the court and *not after trial* of the Superior Court action. The examination of the record concerning the settlement conclusively shows that any settlement negotiation was not made after the trial of the case. In this we refer to Mr. Romley's testimony on pages 312, 313 and 314 of the Transcript of Record. All of Mr. Romley's testimony shows that the negotiations were prior to the trial. It is difficult for the writer to remember the exact time settlement negotiations were discussed, as those things are sometimes casually and sometimes purposely discussed. We think, however, Plaintiff's Exhibit E - R, 317, 318, 319, which was a letter from Appellant's office to Appellant's counsel, the writer, in this portion explains the offer of settlement.

> "We know that you will prepare a complete report for our file covering in detail the event leading up to this latest development and that our Denver counsel will likewise give us complete information for the record in event of a subsequent garnishment action against the company for failure to pay such a judgment as may be obtained by the plaintiff in this case.
>
> "It was likewise agreed that we would still authorize settlement up to a maximum of $3,000 *under the circumstances* if the plaintiff's attorney was desirous of accepting this amount." (R. 318) (Emphasis ours)

This is at least the authority of the writer toward a settlement negotiation, which was not exceeded. That is that after the motion for continuance was denied we were *still* authorized to settle up to $3,000 *under the circumstances* if the plaintiff's attorney was desirous of accepting that amount. What has happened since the judgment was rendered by the Superior Court shows there was consideration for an offer to dispose of any liability on the part of the Company. It is the contention of Appellant that any offer of settlement at that time was made for the purpose, not of extinguishing the liability of Nollner under the policy as to Mrs. Palmer's cause of action, but to extinguish the possibility of a garnishment action or, as in this case, a direct action, and appeal to this Honorable Court. The letter of authority above referred to states that the Company would still authorize under the circumstances which must mean the circumstances then existing, a maximum of $3,000. This offer was before judgment, which would further indicate that the Company, as well as the Company's counsel, was of the opinion that a judgment would be granted Appellee without Nollner's presence, even though his deposition were there and even though the case was tried to the court and even though the affidavit was read into the record by the Court.

W feel that the District Court erred in the last portion of Finding of Fact No. 12, for certainly that is not material to show a waiver on behalf of the Appellant. Testimony concerning the discussion of appeal or motion for new trial appears in the record as Plaintiff's Exhibits F and G, (R. 321-325.) It shows that this writer discussed whether or not *under a strict reservation of* rights there should be a motion for new trial filed and an appeal from the judgment or whether we should allow garnishment proceedings to be filed. It was our statement at that time that we felt very little would be gained by an appeal and the Company felt that it should do nothing but allow garnishment proceedings to be filed by Plaintiff's attorney. (Plaintiff's Exhibit F, page 321). Certainly discussing what might be done after

judgment under a reservation of rights is a long cry from any waiver or estoppel.

The Honorable District Court erred in inserting this phrase in one of its Findings of Fact, without setting forth additionally that these actions were considered only under a strict reservation of rights. These were communications between attorney and client concerning the discussion of procedure after a denial of liability under the policy.

The Supreme Court of Pennsylvania, in *Cameron v. Berger,* 336 Pa. 229, 7 A. 2d 293, stated as follows:

> "Plaintiffs insist, however, that the offers of settlement made by the garnishee's agent, and certain statements attributed to them, indicate that Mrs. Berger's absence was not injurious, because she had no material evidence to offer, and no valid defense to the charge of negligence. The record does not establish such a complete absence of a defense, and the fact that a settlement was discussed would not, in itself, be conclusive of the merits of the respective claims. Furthermore, even if the insured's liability were clear, the garnishee was prejudiced by her failure to contest the important issue of the amount of damages to be awarded. This the garnishee could not have done except by its full assumption of the defense of the case, which would have jeopardized its right to avail itself of defendant's breach of the insurance contract. See Malley v. American Indemnity Corp., 297 Pa. 216, 146 A. 571, 81 A.L.R. 1322; Graham v. United States Fidelity & Guaranty Co., 308 Pa. 534, 162 A. 902; Moses v. Ferrel & Indemnity Co. of America, 97 Pa. Super. 13."

We have discussed the above argument as though it actually made some difference as to whether or not a successful defense could have been maintained in the absence of Nollner or whether or not his appearance was absolutely necessary. This Honorable Court in the case of *Home Indemnity Company vs. Standard Acc. Ins. Co.,* supra, stated as follows at page 925:

"In its brief, Standard asks the following rhetorical question: '"Would its (the appellant's) opportunity to investigate and dispose of the claims have been better if White had told a representative of appellant the first time he talked to him that he may have fallen asleep and the accident may have occurred at that time, although he knew none of the facts of the accident?' "

and at page 928:

"In Seltzer v. Indemnity Ins. Co., supra, 252 N.Y. 330, 169 N.E. at page 404, the court said:

" 'The testimony of Wasserman, if given according to his affidavit, was at least material on the trial of the negligence cases. It might have helped the defendant and the insurance company, and again it might not have been of any avail. This, however, is not the point. The insurance company was entitled to the defendant's assistance and to a truthful statement of the cause of the accident.' "

VI.

Nollner's Failure to Attend the Trial Was a Material Breach of the Policy and the Appellant Was Prejudiced by Such Breach

Under this heading comes the subject of whether or not the failure of Nollner to appear and attend the trial was material. No argument is particularly necessary on this subject if the holding in the case of *Coleman v. New Amsterdam Casualty Co.,* supra. is followed. A review of the cases on this matter reveal the following findings basically. Where the insured failed to notify the company of the accident and the notification was made a few days later, then the breach was not considered material since there was no prejudice to the company. In a majority of all the cases where the failure to cooperate or the failure to give notice existed up to the time the company withdrew and was not cured, it has been held that the breach was material and either that

there was prejudice found as a matter of law or that no prejudice need be shown. A case on this subject is the case of *Bauman v. Western & Southern Indemnity Co.,* 230 M.A. 835, 77 S. W. 2d 496, and in that case the Court stated concerning the assured's failure to attend the trial as follows, at page 501:

> "We are of the opinion that the failure of Baird, the assured in the case at bar, to appear in court for the trial very materially prejudiced and handicapped appellant in its efforts to defend the damage suit brought against him, and constituted a clear breach of the condition of the policy which required him to co-operate with appellant in such defense, warranting appellant in withdrawing from the case."

A good statement of the rule is set forth by the Supreme Court of New Hampshire in *Glens Falls Indemnity Co. v. Keliher,* supra. The Supreme Court of Illinois in*Schneider v. Autoist Mut. Ins. Co.,* 346 Ill. 137, 178 N. E. 466, stated as follows at page 467:

> "* * * The condition of the policy requiring co-operation on the part of the assured in the defense of the action brought against him by the injured party is one of great importance. Without the presence of the assured and his aid in preparing the case for trial, the insurance company is handicapped, and such lack of co-operation must result in making the action incapable of defense. The action of Allen in refusing to go to New York on the trial of the case there prevented the insurance company from making any defense. Obviously he could not recover in a suit on the policy, and neither can the plaintiff here."

In the case of *Bauman v. Western & Southern Indemnity Co.,* supra, the Court stated at page 503 as follows:

> "In view of the evidence in this case and the plain and unambiguous language of the co-operation clause of the policy, we believe it is not within the power of any one standing in Baird's shoes, nor is it within the power of the court, to say that Baird's absence from the court at the trial was immaterial.

We are of the opinion that the trial court erred in rendering judgment for respondent on this record. The judgment is therefore reversed."

In the case of *Cameron v. Berger,* supra, the assured disappeared from her home to avoid arrest and was not present at the trial and the company finally addressed letters disclaiming responsibility under the co-operation clause. The Court held that this lack of co-operation was a matter of law, since it was a material breach. The court in that case stated:

"We are not unmindful of the rule that where an insurer seeks to avoid liability for lack of co-operation, the question whether there has been a material breach of the condition is ordinarily for the jury. Bachman v. Monte, supra (326 Pa. page 297, 192 A. 485). Here, however, the evidence of the failure of the insured to co-operate conclusively appeared, and the trial court should, *as a matter of law,* have directed judgment for the garnishee in both cases. See Zenner v. Goetz, 324 Pa. 432, 438, 188 A. 124." (Emphasis Supplied)

This holding also appears in the case of *Fischer v. Western & Southern Indemnity Co.,* supra, and the Court held in that case that the assured's material and inexcusable lack of co-operation appeared as a matter of law. The same ruling was followed in the case of *Whittle v. Associated Indemnity Corporation,* supra.

It would appear from these cases that failure of the assured to attend the trial under the circumstances of this case was a breach of a material condition and we feel that the evidence shows as a matter of law that there was substantial prejudice to the appellant. In the case of *Cameron v. Berger,* supra, the Court stated as follows:

" * * * The co-operation clause unquestionably constituted a material condition of the policy, and from the record it clearly appears that it was breached by Mrs. Berger in such manner as to forfeit her rights against the company.

> "It is true, as plaintiffs contend, that the garnishee had the burden of proving, not merely a breach of this condition, but that the breach was such as to result in 'substantial prejudice and injury to its position'. Conroy v. Commercial Casualty Ins. Co., 292 Pa. 219, 224, 140 A. 905, 907; and see McClellan v. Madonti, 313 Pa. 515, 169 A. 760; Bachman v. Monte, 326 Pa. 289, 192 A. 485. There can be no doubt here that defendant's failure to co-operate was both prejudicial and injurious to the garnishee."

Also see *Hutt v. Travelers' Ins. Co.,* 110 N. J. 57, 164 A. 12 (N.J.)

This matter was ably discussed by this Court in the case of *Home Indemnity Company vs. Standard Accident Ins. Co.* supra, where the court found that it was undisputed that White made five different statements as to how the accident occurred and the lower court found that the company had not been in any way prejudiced by those statements or omissions and this Court held that that was a conclusion of law or, at most, an inference from undisputed facts, which the reviewing court was in as good a position to make as was the trial court. We feel that the same rule follows from the assured's failure to attend the trial. This Honorable Court in the case of *Home Indemnity Company vs. Standard Acc. Ins. Co.,* supra, made this statement:

> "We do not believe that any practicing attorney in any state, confronted with these four various versions on the part of his client, would consider that the latter was 'co-operating'!"

Likewise, we do not believe any practicing attorney in any state would consider that his client was cooperating if he refused to attend the trial and we think that whether there was insurance or otherwise, an attorney under those facts would attempt to withdraw, if possible. In our opinion, the statements of this Court in *Home Indemnity Company v. Standard Acc. Ins. Co.,* supra, at page 929, are pertinent and we adopt those statements as the law which should be applied in this case.

"In our opinion, the law governing conditions precedent in insurance contracts is correctly stated in Whittle v. Associated Indemnity Corporation, 130 N.J.L. 576, 33 A. 2d 866, 868, 869, in which there was considered a policy having a clause in identically the same language as that quoted above. There the Court of Errors and Appeals said:

" 'These conditions are not, as urged, conditions subsequent. * * * In the case at bar the stated conditions by the very terms of the policy (Condition 10) are made conditions precedent. * * * Moreover, we have held that they are "conditions in the nature of a promissory warranty," and that they are "conditions precedent to the right of recovery."

* * * * *

" 'And if the test were that it must be shown that the failure to fulfill the conditions precedent prejudiced the insurer, the trial judge might well have been justified, under the proofs, in submitting the case to the jury. But that is not the test. The test is: Was a condition precedent of the policy unfulfilled by the assured? If it was then, if the insurer so chooses and it did so choose, the policy is at an end ** *, for "there has been a failure to fulfill a condition upon which insurer's obligation is dependent." Coleman v. New Amsterdam Casualty Co. (Supra).

" 'The "construction and effect of a written instrument is a matter of law to be determined by the court and not by the trier of fact." And in the absence of an infirmity in a contract (none is here alleged) our "function" is to "enforce a contract as it is written." And if the "insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss." * * * In short, the law does not make a better contract for the parties than they chose to make for themselves. (Case cited)'

"In the instant case, the 'insured cannot bring himself within the conditions of the policy'. Accordingly, we hold that 'no action shall lie against the company'."

In a more recent case arising out of this Circuit, namely, *Standard Accident Insurance Company v. Winget,* 197 F. 2d 97, this Court was following the rule set forth in the *Home Indemnity case,* and made the observation we made at the beginning of this heading of the argument, to the effect that in every one of the cases in which non-co-operation was found, the Court was convinced that the concealment, because of its nature or the long duration of time for which it was maintained, was of such character that the Court could, as a matter of law infer harm to the Company.

The Supreme Court of California, in the very well reasoned opinion of *Valladao, et al, v. Fireman's Fund Indemnity Co.,* 13 Cal. 2nd 322, 89 P. 2d 643, considered very definitely the question of whether or not prejudice was essential to the assured's defense and if under certain facts, as a matter of law, prejudice could be presumed. In this case, the California court discussed the *Coleman v. New Amsterdam Casualty Co.* case, supra, the *Hynding v. Home Accident Ins. Co.,* 214 Cal. 743, 7 P. 2d 999, as well as the case of *Purefoy v. Pacific Automobile Indemnity Exchange,* 5 Cal. 2d 81, 53 P. 2d 155. The Court in the Valladao opinion states that in the Hynding case it was not necessary to the disposition of the Hynding case that that point be decided. The Court also stated that it declined to make a determination of whether the insurer must make a showing of prejudice and paralleled its decision with the decision in the Purefoy case, supra. The Court further stated that there was an absence of unanimity as to whether or not the insurer was required to make a showing of prejudice from breach of the co-operation clause in order to relieve itself from liability and cited the Coleman case, supra, to the effect that prejudice need not be shown.

In discussing the Purefoy case, supra, the Court pointed out that prejudice was presumed from the failure of the assured to notify the Company of the accident for a year and three months although it learned of the accident three and a half months after-

wards from the injured parties, inasmuch as such conduct precluded prompt investigation of the accident, and stated that the insurer was entitled to rely on a substantial breach of so material a condition of its policy. The Court states as follows:

> "So it is in the present case, we are satisfied from an examination of the record that as a matter of law prejudice must be presumed (if prejudice be essential to the insurer's defense) from the substantial and wilful breach by the assured of the material co-operation clause of the policy."

In this respect, we should like to point out that *Section 61-330, A.C.A. 1939,* under the statute relating to insurance contracts, states as follows:

> "Every contract of insurance shall be construed according to the terms and conditions of the policy * * *"

Thus, it is the contention of Appellant that inasmuch as there was a condition precedent to recovery and that condition was co-operation on behalf of the insured, if the rule adopted by this Court is to the effect that prejudice must be shown, we feel that the facts of this case do show prejudice from a breach of the material co-operation clause.

In the event the Court should follow the ruling of the *Coleman* case, supra, we feel that great weight is given to this holding by virtue of the Arizona statute and Arizona cases previously decided.

Conclusion.

In conclusion, we respectfully submit that the District Court made the errors set forth in our Specifications of Error and that the minute entry order of October 22, 1953 by the Court, ordering judgment for the Defendant was proper, and that this judgment

should be vacated and reversed with directions to enter judgment for the Defendant as prayed.

Respectfully submitted:

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No. 14560

IN THE

United States Court of Appeals

For The Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation, Appellant, vs. AUDRA H. PALMER, Appellee.	Appeal from the United States District Court for the District of Arizona

BRIEF OF APPELLEE

MOORE & ROMLEY
Attorneys for Appellee

TABLE OF CASES AND AUTHORITIES

CASES

CASES (Continued)

CASES (Continued)

RULES and STATUTES

TEXTS

No. 14560

IN THE

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation,
Appellant,

vs.

AUDRA H. PALMER,
Appellee.

Appeal from the United States District Court for the District of Arizona

Preliminary Statement

For brevity and convenience we will refer to the parties as they appeared in the trial court: Appellee as "plaintiff", and Appellant as "defendant". The transcript of record will be referred to as "Tr.", and the brief of Appellant as "B.A.".

STATEMENT OF THE CASE

On appeal the evidence must be viewed most favorably to the judgment, findings of fact and conclusions of law made and entered by the trial court. *Kansas City Stock Yards Co. of Maine vs. Anderson* (C.A. 8), 119 Fed.(2d) 91. Appellant's Statement of the Case is most favorable to appellant. In keeping with the rule just mentioned, appellee will make a new statement.

Undisputed Facts

The following facts are not disputed:

On January 17, 1948 Ralph E. Nollner was driving his 1946 Studebaker Sedan with his wife, Mrs. Nollner, his daughter, Mrs. Hillyer, and the plaintiff, Mrs. Palmer, riding therein as passengers. An accident occurred as a result of which Mrs. Nollner was killed and Mrs. Hillyer and Mrs. Palmer sustained serious injuries.

At the time of the accident Nollner was insured against liability by defendant; he gave due notice of the accident to defendant.

Plaintiff commenced an action in the Superior Court of Maricopa County, Arizona against Nollner for the injuries she sustained. Counsel for defendant represented Nollner in that action. On March 31, 1950 he took the deposition of Mrs. Hillyer, and on May 2, 1950 he took the deposition of plaintiff. Accordingly, defendant was fully advised as to the contentions of the passengers in Nollner's automobile, both with respect to the collison and how it occurred and with respect to any admissions which Nollner may have made to them.

Defendant made no effort to take Nollner's deposition. Upon stipulation and at plaintiff's request his deposition was taken on July 21, 1950 in Denver, Colorado, where Nollner resided. In his deposition Nollner testified fully and freely and favorably to the defendant, in the presence of counsel for both parties, as to the collision and how it occurred. He expressly denied that he had admitted to anyone that he was at fault or to blame for the collision.

After several continuances the Superior Court action was set for trial on January 11, 1951. On January 10, defendant's counsel received a telegram from Nollner reading as follows:

> "Regret inability to leave Denver today as originally planned. Two of field men ill, one in hospital for operation and I would jeopardize my position by leaving. Hope postponement can be arranged."

Upon receiving this telegram defendant's counsel filed a motion for continuance supported by his affidavit reciting the substance

of the telegram. The affidavit also recited in detail Nollner's version of how the accident occurred as related in his deposition, and that Nollner would so testify if present in court.

On January 11, 1951, the motion for continuance was denied. Defendant's counsel then asked leave of court to withdraw as counsel for Nollner. In resisting this request plaintiff offered the following stipulations: that Nollner, if present at the trial, would testify to the facts as recited in the affidavit of defendant's counsel; that the trial be continued for three or four days; that a jury be waived and the cause tried to the court; and that Nollner's deposition be received in evidence without objection. All of these proffered stipulations were refused.

The leave requested was granted and defendant's counsel withdrew as counsel for Nollner. Upon motion of the plaintiff the jury was discharged and the cause tried to the court. During the course of the trial Nollner's deposition was offered and received in evidence. On January 18, 1951 judgment was entered in Superior Court in favor of plaintiff and against Nollner in the amount of $27,500.00. That judgment is now final.

Execution on the judgment was returned unsatisfied. Plaintiff demanded payment from defendant, and upon defendant's refusal this action was commenced.

Defendant states that evidence of the failure of Nollner to attend other trial dates in the Superior Court action "is immaterial since the trial was held on January 11, 1951". (B.A. 10) But defendant itself dwells upon this evidence at some length. (B.A. 4-6)

Facts Proven By Evidence

In that connection the evidence disclosed as follows:

Early in February, 1950 the Superior Court action was first set for trial on June 6, 1950. (Tr. 134-136) Yet defendant did not notify Nollner of this trial setting until May 9, 1950. (Tr. 133-136, 263) On May 10, 1950 defendant's claims manager in Berkeley, California wrote a letter to defendant's claims manager for Colorado in which he stated (Tr. 139):

"We would appreciate your advising your Denver office to be alerted for a request from Mr. Linton to the policyholder to proceed to Phoenix, Arizona, for purposes of allowing the plaintiff's attorneys to take his deposition. At such time as this request is made, it will be necessary for the Denver office to assist the assured with a travel advance and to make certain that Mr. Nollner does proceed to Phoenix as requested. A complete refusal on his part would be definite indications of lack of cooperation, and the matter of actually extending a defense to the lawsuits, if trial materializes, would then be given serious consideration by this office."

On May 17, 1950 defendant's counsel communicated with Nollner for the first time. (Tr. 135).

He wrote a letter in which he asked that Nollner be in Phoenix on May 22nd or 23rd for a deposition and then return on May 31, shortly before the trial of another Superior Court action pending against him by Mrs. Hillyer. (Tr. 64) On May 23, defendant's Denver counsel took a court reporter's statement from Nollner wherein Nollner stated that he was Public Relations Director for the Salvation Army, that he was in charge of and agreed to conduct fund raising campaigns, that on March 29, before he was notified of the trial, a proposal was submitted to the Denver Community Chest for the raising of funds for the Salvation Army Training College, that the Salvation Army was given until June 1 to raise the money, that between June 1st and June 15th a similar campaign had to be conducted in Salt Lake City, that still another campaign had to be completed in Colorado Springs by July 1st, that he could not possibly get away before July 1 without resigning his position, that after July 1 he would be in position to go to Phoenix if the cases could be continued, that until then he had to devote his full time to the campaigns because no one could take his place, and that he might be able to get away for one day on May 29th or 30th for the deposition. (Tr. 69-78) When pressed by defendant's counsel for a refusal, Nollner stated (Tr. 75):

"It isn't a question of refusing to go. It's a question which I have to decide which is more important to me. I have to make a living, and I have to decide whether that is more im-

portant or going to the trial and going out and finding something else to do. My living is more important, and I have to make that decision, myself."

Upon receipt of the court reporter's statement, counsel for defendant filed a motion for continuance which was argued on May 27, 1950 and at that time the trial was postponed to July 13, 1950. (Tr. 80-81) On July 3, defendant's counsel wrote Nollner advising him of the July 13 trial setting and asking that he be in Phoenix on July 10. (Tr. 85) While this letter indicates there had been a prior conversation between defandant's counsel and Nollner the evidence did not disclose when that conversation took place, that is, whether it was on July 1, July 2, or earlier.

On July 7 defendant's Phoenix counsel received a telephone call from Nollner who stated that he would not be able to come to Phoenix for a trial on July 13 because he was carrying on a campaign for the Salvation Army and would jeopardize his job by leaving. (Tr. 88-92) On July 8 defendant's counsel received a telegram from Nollner reading as follows (Tr. 89):

"Regret inadvisable leave Denver next week for Palmer trial. As it would jeopardize my position which I can not afford to lose. Hope trial can be postponed. Letter follows."

On the same day, July 8, 1950, Nollner wrote a letter to his daughter, Mrs. Hillyer, in which he said (Tr. 278-279):

"It seems as though I will not see you this week. Talked with Mr. Linton over long distance yesterday and also with lawyer here Friday and we are hoping matter will be settled out of court (say nothing about it to anyone). Anyway it was finally decided by all parties, lawyers and insurance men, that I can not afford to jeopardize my work and my job and whatever happens I must stay here at present for I can not possibly spend a week away at this time. Attorney here has talked with members of advisory board and he knows the situation. No one to carry on so I will just have to be here."

On July 12 defendant's counsel filed a motion for continuance (Tr. 90) which was heard on the same day, and at that time the case was set for trial on September 25, 1950. (Tr. 95)

Up to the time of this continuance there had been no refusal

on the part of Nollner to attend trial. He had requested postponements for business reasons and defendant's counsel felt obliged to move therefor. (Tr. 145, 150, 154, 155)

The last motion for continuance, however, was made with the hope that it would be denied so that defendant's counsel could withdraw from the case for lack of cooperation. (Tr. 156-158)

On July 13 defendant's counsel sent both a letter and a telegram to Nollner advising him that the case had been continued to September 25, 1950. (Tr. 98) Pursuant to these communications Nollner made arrangements for a vacation in order for him to be present at the trial at that time. (Tr. 109) On September 9 defendant's counsel again wrote Nollner that the court to whom the case had been assigned could not hear the same on September 25 and had therefore reset it for December 19, 1950. (Tr. 100-101) By the time Nollner received this letter it was too late to change his vacation period. (Tr. 107) Thereafter Nollner sent a telegram to defendant's counsel wherein he stated (Tr. 106):

> "Impossible for me to be present 19th as Christmas welfare load Salvation Army requires all personnel here. Letter follows about later date. Regards."

His telegram was followed by a letter wherein he advised defendant's counsel that the Salvation Army had an unusually heavy welfare load for Christmas which required everyone in his office to work day and night and for this reason he could not leave at that time. (Tr. 107-108) Pursuant to this advice defendant's counsel on December 17 filed a motion for continuance which was granted and the trial postponed to January 11, 1951. (Tr. 109) On December 22, 1950 defendant's counsel wrote Nollner advising him of the postponement. (Tr. 111-112)

On January 9, 1951 Nollner made reservations to fly to Phoenix on January 10. (Tr. 113-114, 266) On January 10 he wired defendant's counsel as follows (Tr. 116):

> "Regret inability to leave Denver today as originally planned. Two of field men ill one in hospital for operation and I would jeopardize my position by leaving. Hope postponement can be arranged."

Pursuant to this telegram defendant's counsel on January 10 filed a motion for continuance. (Tr. 114-115) The telegram was read to the court. (Tr. 187) Attached to the motion was an affidavit by defendant's counsel that if Nollner were present he would testify to the facts therein contained; these facts were much the same as testified to by Nollner in his deposition and were favorable to defendant. (Tr. 338-339) In order to prevent further delay plaintiff offered to stipulate that Nollner if present would testify to the effect recited in the affidavit of defendant's counsel. The offered stipulation was refused. (Tr. 120-121, 189) Thereupon the motion for continuance was denied and the court advised counsel for both parties that the case would again be taken up at 1:30 the next day, January 11. (Tr. 121)

On January 11 defendant's counsel filed a motion to withdraw as counsel for Nollner. The motion was heard at 1:30 on January 11. (Tr. 117-130) Immediately prior to the hearing, counsel for defendant renewed an offer to settle the case for $3,000.00. (Tr. 164, 314) At the hearing plaintiff offered to stipulate that when the case proceeded to trial counsel for Nollner could offer Nollner's deposition in evidence without objection. (Tr. 122) Plaintiff also offered to stipulate that the jury be discharged and the case tried to the court. (Tr. 123) Counsel for defendant, who was still counsel of record for Nollner, refused the stipulations. (Tr. 123, 185) He acknowledged that he had made full preparation for the trial in Superior Court except for a final conference with Nollner. (Tr. 126, 191) He further stated that if Nollner should appear he would have to have a short continuance since his trial preparations had been laid aside. Plaintiff's counsel then offered to stipulate to a continuance of three or four days to enable counsel for defendant further time to contact Nollner and see if he could be present. (Tr. 126, 187-189, 195) The stipulation was refused. (Tr. 195-196, 199) Had Nollner been present counsel for defendant would have proceeded to trial. (Tr. 191) Defendant's counsel did not know that Nollner wouldn't come to Phoenix if the case was continued three or four days as plaintiff offered. (Tr. 200) Counsel for plaintiff, who himself does considerable insur-

ance litigation (Tr. 311), testified that in his opinion defendant was not prejudiced at all by the failure of Nollner to appear at the trial under the circumstances. (Tr. 327)

SUMMARY OF ARGUMENT

The failure of Nollner to attend the trial in Superior Court, standing alone, did not constitute a breach of the cooperation clause in defendant's insurance policy. In order to constitute a breach his failure must have been inexcusable, substantial and prejudicial to defendant.

Whether Nollner's absence from the trial was such a failure was a question of fact, the burden of establishing which rested upon the defendant.

Nollner had not received timely notice of the first two trial settings. The third setting was vacated by the Superior Court on its own motion. Defendant did not seek to avoid the December 19 date when it was set as it easily could have done. Instead it forced Nollner to request another continuance because of the heavy work of the Salvation Army during the Christmas season.

Nollner was not only prepared but in fact had made arrangements to come to Phoenix for the January 11 trial. On the morning he was to leave he was informed that two of his fellow workers were ill and he was requested by his superior to leave immediately for Monte Vista and Alamosa. Nollner wired this information to defendant's counsel and requested that the trial be postponed.

Defendant's counsel had long before taken the depositions of Nollner's daughter and the plaintiff, the only two surviving passengers in Nollner's automobile. Although defendant made no offer to take Nollner's deposition it was finally taken at plaintiff's insistence. In his deposition Nollner testified fully as to the accident and how it occurred, and he expressly denied that he had admitted to anyone that the accident was his fault. His testimony was favorable to defendant.

Defendant's counsel was fully prepared for the Superior Court trial. While still counsel of record for Nollner he refused to

stipulate that Nollner would testify to the facts set forth in the affidavit which he himself had prepared. He refused to stipulate that Nollner's deposition be admitted in evidence without objection. He refused to stipulate that the cause be tried to the court instead of a jury. He even refused to stipulate to a continuance which Nollner desired and which he, as Nollner's counsel, had requested.

Defendant's entire course of conduct evidences a constant effort on its part to withdraw from Nollner's defense and to deny him and the plaintiff the benefiits of the policy for which it had contracted. Defendant did not act in entire good faith and did not represent Nollner to the benefit of his interests.

Under the circumstances the absence of Nollner from the trial was excusable and defendant was in no way prejudiced thereby. Further, defendant waived Nollner's absence from the trial.

ARGUMENT

I

Failure to Attend Trial, Standing Alone, Does Not Constitute Breach of Cooperation Clause

We do not dispute defendant's contention that plaintiff has no greater right to recover against the insurance company than the insured, Nollner, would have. Nor do we dispute that the failure of the insured to attend trial may, under some circumstances, constitute a breach of the cooperation clause in defendant's insurance policy. But the failure of the insured to attend trial certainly does not under all circumstances constitute a breach of the cooperation clause.

Failure to Comply Must Be Inexcusable And Prejudicial

By the great weight of authority, to constitute a breach of the cooperation clause there must be lack of cooperation in some substantial and material respect that results in prejudice to the insurer.

Federal Decisions:

Standard Accident Ins. Co. v. Winget (C.A. 9), 197 Fed. (2d) 97, 34 A.L.R.(2d) 250

Norwich Union Indem. Co. v. Haas (C.A. 7), 179 Fed. (2d) 827

General Acc. Fire & Life Assur. Corp. v. Reinert (C.A. 5), 170 Fed.(2d) 440

State Automobile Mut. Ins. Co. v. York (C.C.A. 4), 104 Fed. (2d) 730

State Farm Mut. Auto. Ins. Co. v. Koval (C.C.A. 10), 146 Fed.(2d) 118

Pacific Indemnity Co. v. McDonald (C.C.A. 9), 107 Fed. (2d) 446

Associated Indemnity Corp. v. Davis (C.C.A. 3), 136 Fed. (2d) 71

Alabama:

George v. Employers' Liability Assur. Corp., 122 So. 175, 72 A.L.R. 1438

California:

Hynding v. Home Acc. Ins. Co., 7 Pac(2d) 999, 85 A.L.R. 13

Panhans v. Associated Indemnity Corp., 47 Pac.(2d) 791

Norton v. Central Surtey & Insurance Co., 51 Pac.(2d) 113

Jenson v. Eureka Casualty Co., 52 Pac.(2d) 540

Wormington v. Associated Indemnity Corp., 56 Pac.(2d) 1254

Colorado:

Farmers Automobile Inter-Insurance Exchange v. Konugres, 202 Pac.(2d) 959

Connecticut:

Rochon v. Preferred Accident Ins. Co. of New York, 171 Atl. 429

Delaware:

Brooks Transp. Co. v. Merchants' Mut. Cas. Co., 171 Atl. 207

Florida:

American F. & Cas. Co. v. Vliet, 4 So.(2d) 862

Idaho:

Leach v. Farmer's Automobile Interinsurance Exch., 213 Pac. (2d) 920

Kentucky:

Metropolitan Cas. Ins. Co. of New York v. Albritton, 282 S.W. 187

Louisiana:

Levy v. Indemnity Ins. Co. of North America, 8 So.(2d) 774

Maine:

Medico v. Employers' Liability Assur. Corp., 172 Atl. 1

Michigan:

Bernadich v. Bernadich, 283 N.W. 5

Kennedy v. Preferred Automobile Ins. Co., 30 N.W.(2d) 46

Missouri:

Finkle v. Western Automobile Ins. Co., 26 S.W.(2d) 843

North Carolina:

McClure v. Accident & Cas. Ins. Co., 49 S.E.(2d) 742

Oregon:

Riggs v. New Jersey Fidelity & Plate Glass Co., 270 Pac. 479

Pennsylvania:

Conroy v. Commercial Casualty Ins. Co., 140 Atl. 905

Bachman v. Monte, 192 Atl. 485

Cameron v. Berger, 7 Atl.(2d) 293

Washington:

Taxicab Motor Co. v. Pacific Coast Casualty Co., 132 Pac. 393

Lienhard v. Northwestern Mutual Fire Ass'n., 59 Pac.(2d) 916

West Virginia:

Marcum v. State Auto. Mut. Ins. Co., 59 S.E.(2d) 433

See also:

Blashfield, Cyclopedia of Automobile Law and Practice, Vol. 6, Sec. 4059, p. 78

Huddy, Encyclopedia of Automobile Law, Vol. 13-14, Sec. 298, p. 378

Richards on Insurance, Vol. 2, Sec. 361, p. 1189-1190

Absolute Compliance Not Required

Contrary to the above authority, defendant urges that any failure to comply strictly with the cooperation clause ipso facto vitiates the policy, regardless of reason or

consequence. (B.A. 30-39) In support of this contention defendant cites *Coleman v. New Amsterdam Casualty Co.* (N.Y.), 160 N.E. 367; *Home Indemnity Co. of N.Y. v. Standard Acc. Ins. Co.* (C.C.A. 9), 167 Fed.(2d) 919; *Glens Falls Indemnity Co. v. Keliher* (N.H.), 187 Atl. 473; *Curran v. Connecticut Indemnity Co.* (Conn.), 20 Atl.(2d) 87; *Hartford Accident & Indemnity Co. v. Partridge* (Tenn.), 192 S.W.(2d) 701; and *Whittle v. Associated Indemnity Corp.* (N.J.), 33 Atl.(2d) 866.

In the *Coleman* case the insured admitted that a mistake had occurred in compounding a prescription but refused to say more unless the insurance company would undertake to pay any judgment against it. The necessity for showing prejudice was not discussed directly. Inferentially however Judge Cardozo held that prejudice must be, and was in fact, shown when he said (160 N.E. 369):

> "The question remains whether the conduct of the assured was *such* a refusal to co-operate as to vitiate the policy. We are satisfied it was. * * * The insurer was not required to content itself with an unexplained admission that a mistake had occurred, when, coupled with the admission, there was a refusal to say more except at a price. The cause and occasion of the mistake were facts undisclosed, yet important to be known. The drugs or their containers might have been misbranded by the manufacturer or by some one else. The ingredients might have been harmless. In divers ways, there might be defense to a charge of negligence, or at all events palliation, though mistake were conceded. The default of the assured was more than sluggishness or indifference, *phases of thought and conduct that might be the subject of varying inferences when considered by a jury.* * * *" (emphasis supplied)

In the *Home Indemnity* case the insured had given several statements to the company with regard to the accident, all inconsistent. On the question of prejudice the Court quoted from the *Coleman* case and said (167 Fed.(2d) 925):

> "From the foregoing, therefore, it will be seen that there is impressive authority for the proposition that an insurer need not show that it has been prejudiced by the insured's lack of

co-operation. If the terms of the policy are plain, most courts hold that the insured's breach of the co-operation clause ipso facto relieves the insurer of liability.

"It is not necessary, however, for us to adopt this somewhat strict rule of construction. Other considerations compel us to the conclusion that the insurer cannot be held liable in the instant case."

The Court went on to hold that the insurance company in fact had been prejudiced.

In the *Glens Falls* case the insured had disappeared without explanation. The Court specifically said (187 Atl. 477):

"* * * the character of the assured's conduct and the importance of its probable effect upon the interests of the insurer may be considered for the purpose of determining whether there has been a substantial breach * * *"

In the *Curran* case the Court held that an immaterial and unsubstantial failure of the insured to comply with the cooperation clause does not constitute a breach thereof "and lack of prejudice to the insurer from such failure is a test which usually determines that a failure is of that nature." See 20 Atl.(2d) 87, 89.

In the *Hartford* case the insured had been requested to attend the trial and had promised to do so, but then proceeded to go on a liquor binge and failed to appear. The question of prejudice was not discussed, but certainly it existed and the Court rightfully held that the insured's failure to appear was inexcusable.

The *Whittle* case is the only one cited by defendant, and the only one we have been able to find, which holds that the failure of the insured to comply strictly with the cooperation clause, no matter how inconsequential, ipso facto vitiates the policy regardless of the circumstances or prejudice. This case is clearly against the weight of authority and should be disregarded.

The Law of Arizona

The Arizona Supreme Court has never had occasion to decide a case similar to this. In *Watson v. Ocean Accident & Guaranty Corp.*, 238 Pac. 338, and *Massachusetts Bonding & Ins. Co. v. Arizona Concrete Co.*, 56 Pac.(2d) 188, the question of failure to give

notice of the accident or loss was involved. The Court held that the failure to give notice as specified in the insurance policy did not vitiate the same in the absence of showing the insurer was prejudiced thereby. In *Berry v. Acacia Mut. Life Ass'n.*, 67 Pac.(2d) 478, the insurance policy required proof of disability before default in the payment of the premium. The claimant became ill and unable to make such proof within the prescribed time. The Arizona Supreme Court held that the policy requirement was a condition precedent and reviewed the cases holding an insured to strict compliance therewith. These cases were expressly rejected however, the Court holding (67 Pac.(2d) 482:

> "The matter has never been before the courts of Arizona, and we consider ourselves, therefore, at liberty to adopt that rule which seems most in consonance with the general principles of equity."

Mindful of the harshness of forfeiture, the Arizona Supreme Court applied the principles of equity, held that the claimant was excused from strict compliance with the condition precedent and permitted him to recover.

The *Whittle* case, supra, sets forth an extreme, and by far the minority, rule of interpretation. It is evident from the foregoing cases that the Arizona Supreme Court would not adopt this view. It would most certainly adopt the rule "most in consonance with the general principles of equity"—the majority rule, which holds that to constitute a breach of the cooperation clause there must be a lack of cooperation in some substantial and material respect that results in prejudice to the insurer.

Case Tried on Theory Prejudice Must be Shown

Both in the testimony presented by it and in the findings of fact and conclusions of law which it proposed, defendant proceeded in the trial court on the theory that it was necessary to show defendant had been prejudiced by Nollner's absence from the trial. (Tr. 9-13, 30-33, 131, 174-175) This was also the theory of the plaintiff. (Tr. 16-19, 20-26, 327) Defendant is now precluded from urging a

different theory on this appeal. 3 *Am. Jur., Appeal and Error,* Sec. 253, p. 35.

II

Nollner's Absence Was Excusable and Did Not Prejudice Defendant

Whether or not Nollner failed to cooperate in some substantial and material respect that resulted in prejudice to defendant was a question of fact, the burden of establishing which rested upon the defendant. *State Farm Mut. Auto Ins. Co. v. Koval* (C.C.A. 10), supra, 146 Fed.(2d) 118; *Norton v. Central Surety & Insurance Co.* (Cal.), supra, 51 Pac.(2d) 113; *Leach v. Farmer's Automobile Interinsurance Exch.* (Idaho), supra, 213 Pac.(2d) 920; *Finkle v. Western Automobile Ins. Co.* (Mo.), supra, 26 S.W. (2d) 843; *Cameron v. Berger* (Pa.), supra, 7 Atl.(2d) 293. The trial court determined that question in favor of the plaintiff. Its findings cannot be set aside unless they are clearly erroneous. Rule 52(a), *Federal Rules of Civil Procedure,* 28 U.S.C.A.; *Lassiter v. Guy F. Atkinson Co.,* (C.A. 9), 176 Fed.(2d) 984; *Bjornson v. Alaska S. S. Co.* (C.A. 9), 193 Fed.(2d) 433.

Nollner Was Hindered By His Work

Defendant points to the fact that the Superior Court trial was continued four times, three times on motion for continuance filed by its counsel. How this can possibly benefit defendant's position escapes us. Defendant admits there had been no refusal by Nollner to appear for the June 6 and July 13 trial settings. The exigencies of his employment had led Nollner to request that these settings be continued. But he need not have made this request, for the record is clear that defendant did not give Nollner timely notice of either setting. As to the effect of such failure see *Commercial Cas. Ins. Co. v. Strode* (C.A. 3), 202 Fed.(2d) 599.

Nollner had scheduled his vacation to coincide with the September 25 trial setting. The Superior Court however could not hear the trial on that date and reset the same, on its own motion,

for December 19. By the time defendant advised Nollner of this change it was too late for him to change his vacation. The December 19 trial setting was right in the middle, so to speak, of the Christmas season. The vast and splendid work of the Salvation Army during this period needs no explanation. It is commonly known. That Nollner could not leave during this period should have been expected by defendant. Yet there was no showing that when the September 25 date was vacated defendant requested of the Superior Court or counsel for plaintiff that the action be set at a later date. Instead defendant now points to its motion for continuance as the magnanimous gesture.

Defendant knew of the January 11 trial setting on December 17 but made no effort to advise Nollner of it until December 22. Nevertheless Nollner made arrangements to attend the trial. On January 9 he advised defendant and it was a fact, that he made reservations to fly to Phoenix on January 10. On the morning of January 10 he learned that two field men for the Salvation Army were ill and his superior asked him to leave immediately for Monte Vista and Alamosa. Nollner immediately wired defendant's counsel relating the facts and requesting a postponement. Later that afternoon defendant sent its Denver counsel and a court reporter to take a statement from Nollner. (Tr. 241-248) Nollner was not represented by an attorney. In the best way he knew how he explained the situation. Defendant wishes this Court to believe, from the testimony appearing on page 248 of the transcript, that Nollner could have attended the trial on January 11 if he wanted to but he just didn't care enough about it.

Nothing could be farther from the truth. A fair reading of the entire transcript reveals that Nollner cared a great deal about the trial. It is equally plain that during the course of this last statement defendant's counsel was putting words in Nollner's mouth and Nollner was becoming somewhat perturbed. Nollner attempted to explain that he was urgently needed to go to Monte Vista and Alamosa because of the illness of his fellow workers, that his superior had asked him to leave immediately and that while he could come to Phoenix if he wanted to, he would thereby

place his job in jeopardy.

Defendant's Counsel Was Fully Prepared

Long prior to the Superior Court trial defendant's counsel had taken the depositions of Nollner's daughter and the plaintiff, the only two surviving passengers in Nollner's automobile. Defendant was therefore fully apprised as to their version of how the accident happened as well as any admissions which they claimed Nollner to have made. Defendant made no effort to take Nollner's deposition. Nevertheless it was finally taken at the insistence of counsel for plaintiff. In his deposition Nollner testified fully as to the accident and how it occurred. His testimony was favorable to defendant. He expressly denied that he had admitted to anyone that the accident was his fault. Counsel for defendant was present and had the opportunity to ask any questions he desired.

Defendant's counsel was fully prepared to present Nollner's defense. Counsel for plaintiff offered to stipulate that Nollner would testify to the facts set forth in the affidavit for continuance. In addition he offered to stipulate that Nollner's deposition be admitted in evidence without objection. And he also offered to stipulate that the jury be discharged and the case tried to the Court.

From the foregoing the trial court was fully justified in concluding that Nollner's attendance at the trial was not necessary and excusable, and that defendant was not prejudiced by his absence.

Nollner's Presence Was Not Necessary

Defendant argues that Nollner's absence showed lack of interest. The argument is without merit. Nollner's telegram was read to the Court and the circumstances of his absence fully explained. The case was to be, and was in fact, tried to the Court, not a jury. In *Glens Falls Indemnity Co. v. Keliher* (N.H.), supra, 187 Atl. 473, the Court said that in the trial of cases by jury the absence of the defendant, if not adequately explained, is a circumstance chiefly persuasive as distinguished from probative in its effect. In this case Nollner's absence was more than adequately explained. It must be presumed that the

Court will decide a case on the evidence in the record, of which Nollner's deposition was to be a part. It also must be presumed that where defendant's absence is satisfactorily explained the Court will not indulge in capricious speculation as to lack of interest.

Defendant argues that Nollner's deposition was admitted in evidence and plaintiff nevertheless recovered judgment; therefore the deposition was insufficient. Defendant overlooks the fact that the Superior Court was wholly deprived of the benefit of any cross-examination of plaintiff's witnesses or argument on Nollner's behalf. It is a virtual cliche among trial lawyers that cases are many times won or lost on cross-examination and argument.

In *Lienhard v. Northwestern Mut. Fire Ass'n.* (Wash.), supra, 59 Pac.(2d) 916, plaintiffs were injured in an automobile collision between the car in which they were riding and an automobile driven by one Marston who was insured by defendant insurance company. Plaintiffs sued Marston, recovered judgment, then brought an action against the defendant. The insurance company set up in defense, inter alia, that Marston breached the cooperation clause of the policy for the reason that he absented himself from the trial. The finding of the lower court that the insured had not unreasonably refused to cooperate was affirmed and the court said (59 Pac.(2d) 919-920):

> "* * * In the present case, the insured did not run away, but necessarily removed to California, on assignment by his employer. While it may be inferred that Marston did not inform the appellants' attorneys of his removal to California, they could have learned of his whereabouts by inquiring at the telephone company. But they did know where he was as early as the tenth of January, twenty days before the date set for trial. They knew that he was employed and could not leave his work without financial loss, and that he could not come without incurring expense. After some correspondence, they finally advised him by telegraph that they would pay only his traveling expenses and would not pay for loss of time.
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> * * *
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> "Apart from this, the appellants took no steps to secure the deposition of Marston. After their correspondence with him had shown reluctance on his part to return, and since his

presence was needed as a witness only, it would seem that they were lacking in diligence in not taking his deposition. While, at the trial, they applied for, and were denied, a continuance of sixty days, this request was to enable them to have Marston present, not for time to take his deposition. We cannot assume from the record that he would have refused to testify had a commission issued."

After counsel for defendant withdrew from the Superior Court action as attorney for Nollner, he remained in the court room and listened to that trial as an interested spectator. Although he was a witness at the trial of the instant case, it is interesting to note that he omitted to testify that he was surprised by or unprepared to meet and contradict any of the evidence introduced at the Superior Court trial.

In *Wormington v. Associated Indemnity Corp.* (Cal.), supra, 56 Pac.(2d) 1254, plaintiff was injured in an automobile accident by the negligence of one Locke who was insured by defendant insurance company. Upon recovery of judgment against Locke plaintiff sued defendant insurance company which set up the defense of lack of cooperation by Locke in that he failed to attend the trial. The Court held that violation of the cooperation clause cannot be a valid defense against the injured party unless in the particular case it appears that the insurance company was prejudiced thereby, and stated (56 Pac.(2d) 1256-1257):

"The question of such prejudice was given consideration by the trial court, and, while the assured did not appear at the trial, he did report the accident within 48 hours after it occurred, and gave his deposition. At the time the assured's deposition was taken, appellant's counsel was present, with full opportunity to examine the assured. In our opinion, the finding of the trial court that the assured fully co-operated with the defendant insurance company in the preparation of the defense of said action, and that, if there was any lack of co-operation on the part of said assured, the same was not prejudicial, must, in view of the conflict in the evidence with regard to assured's conduct, be upheld, because of the substantiality of evidence to sustain the decision arrived at by the trial court upon this issue."

Likewise in this case there is ample evidence to sustain the de-

cision of the trial court.

III

Defendant Waived Nollner's Absence

As counsel for plaintiff testified, the question of good faith or bad faith is very much a part of this action.

The evidence shows that on May 10, 1950 defendant's claims manager in Berkley, California, wrote a letter to defendant's Colorado claims manager wherein he stated that a *complete refusal* on Nollner's part to attend the June 6 trial would be definite indication of lack of cooperation and the matter of actually extending a defense would be given serious consideration. This letter was written before defendant's counsel had ever communicated with Nollner informing him of the trial, at a time when it is conceded he had not refused to attend and despite the fact that defendant had not given Nollner timely notice of the trial. Defendant, laying the foundation for withdrawal, sent its Denver counsel to take a court reporter's statement from Nollner and therein advised him of the consequence of his refusal to cooperate. Nollner stoutly maintained that he was not refusing to cooperate but had made a prior commitment before receiving notice of the trial.

On July 7 Nollner telephoned defendant's Phoenix counsel and stated that he would not be able to attend the July 13 trial. The very next day—July 8—he sent the telegram heretofore quoted. This telegram made no reference to the telephone conversation of the previous day and conveys the impression that Nollner was informing defendant's counsel, for the first time, of his inability to attend the trial on July 13. It is of extreme interest that on the same day—July 8—Nollner wrote his daughter stating that he had talked to defendant's counsel and "it was finally decided by all parties, lawyers and insurance men, that I can not afford to jeopardize my work and my job and whatever happens I must stay here at present for I can not possibly spend a week away at this time." Defendant argues that this letter was hearsay. It was not. It was circumstantial evidence of Nollner's state of mind. Although defendant's counsel filed a motion for

continuance of the July 13 trial setting, he did so in the hope that it would be denied so that he could withdraw for lack of cooperation. The record is clear that counsel for defendant persistently threatened to withdraw as a device to force a compromise settlement. (Tr. 154-160)

Upon receipt of Nollner's January 10 telegram, defendant's counsel filed a motion for continuance on Nollner's behalf. The continuance was at first resisted by counsel for plaintiff who offered to stipulate, in accordance with Arizona law, that Nollner if present would testify to the facts set forth in the affidavit annexed to the motion. Because it was so resisted and because counsel for Nollner refused the stipulation, a continuance was denied.

Thereupon counsel for defendant on January 11 filed a motion to withdraw as counsel for Nollner. Immediately prior to the hearing on this motion counsel for defendant renewed an offer to settle the case for $3,000.00. During the course of argument on this motion and before it was granted counsel for defendant acknowledged that he was fully prepared to go to trial except for a final conference with Nollner. Counsel for plaintiff offered to stipulate that Nollner's deposition be admitted in evidence without objection, that the jury be discharged and the case tried to the court and that *the case be continued three or four days.* The proffered stipulations were refused by counsel for defendant who was still counsel of record for Nollner.

Defendant argues that the stipulation for continuance was offered for the purpose of forcing defendant to trial without Nollner present. That is not so. The motion for continuance had been denied and counsel for plaintiff was therefore entitled to have the cause tried that very day. Counsel for defendant had said that if Nollner were present he would proceed to trial. The sole purpose therefore of offering to stipulate to a continuance was to enable defendant's counsel to again contact Nollner and to have him present at the trial. (Tr. 126, 187-189, 195-196) If defendant's counsel had accepted plaintiff's offer to stipulate for a three or four day continuance, the two ill co-workers (whose illness prevented Nollner's attendance on January 11) might have re-

covered from their illness or another substitute for them found, thereby enabling Nollner to be present at the trial.

Rule 80(e), *Arizona Rules of Civil Procedure* (Sec. 21-2006, *Arizona Code* 1939) provides as follows:

> "When the appearance of counsel has been entered for a party in any action or proceeding, he will be held responsible by the court for the conduct of the action until formal notice of withdrawal approved by the court and entered upon the minutes."

Until the motion for withdrawal had been granted it was the duty of counsel for defendant to represent Nollner in a manner most beneficial to Nollner's interests. In refusing the offered stipulations it is manifest that this was not done and that all efforts instead were directed to setting a stage for an attempted escape from liability under the policy on the claim of lack of cooperation.

It is to be remembered that in his January 10 telegram Nollner had expressed the hope that the trial could be postponed. When a postponement was offered by counsel for plaintiff it was the solemn duty of defendant's counsel to accept it on Nollner's behalf. So was it the duty of defendant's counsel to accept on Nollner's behalf the other stipulations offered.

In considering all the evidence and the circumstances of this case the trial court was amply justified in concluding that defendant was searching for an excuse to withdraw from Nollner's defense and did not act in entire good faith towards him. The trial court was likewise justified in concluding that under the circumstances defendant waived Nollner's absence and may not assert that his failure to attend the trial violated the cooperation clause. See *Bachman v. Monte* (Pa.), supra, 192 Atl. 485. The question of bad faith or waiver was properly decided as a matter of fact.

CONCLUSION

The trial court heard and observed the witnesses, duly weighed the evidence, and decided the issues in favor of plaintiff. Defendant would have this court substitute its judgment for that of the trial court. We respectfully urge that the ruling of the learned

trial court was not erroneous and certainly in no sense of the word "clearly erroneous".

No case has been cited by defendant, and we are unable to find one, that is squarely in point. Indeed, such discovery can hardly be expected in cases where the circumstances are so apt to be different. But we do wish to call the Court's particular attention to its statement in *Standard Acc. Ins. Co. of Detroit, Mich. v. Winget* (C.A. 9), 197 Fed.(2d) 97, 103 as follows:

> "These cases emphasize the fact that cooperation implies not an abstract conformity to ideal conduct, but a pragmatic question to be determined in each case in the light of the particular facts and circumstances. And when a jury, weighing the circumstances surrounding a particular event, has concluded that there is no lack of cooperation, and the trial judge, who heard the same testimony, has accepted the verdict, it should not be disturbed on appeal."

The judgment and order appealed from should be affirmed.

Respectfully submitted,

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By.....

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